APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED OCTOBER 18, 2006

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-1583

ARIEL PEREZ, SR., Personal Representative of the ESTATE OF ARIEL E. PEREZ, JR.,

Plaintiff-Appellant,

v.

OAKLAND COUNTY; OAKLAND COUNTY SHERIFF; MICHAEL J. BOUCHARD, Oakland County Sheriff; JOHN DOE, Unknown Oakland County Sheriff's Department Deputies; ROBERTA RICE; MICHAEL MONROE, TERRY MONTGOMERY, and JOHN JORGANSON, Deputies; SARATH HEMACHANDRA, DR., Jointly and Severally,

Defendants-Appellees.

Argued: April 20, 2006

Decided and Filed: October 18, 2006

Before: MOORE, GRIFFIN, and CUDAHY, Circuit Judges.*

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* The Honorable Richard D. Cudahy, Circuit Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

Appendix A

CUDAHY, J., delivered the opinion of the court. GRIFFIN, J. (pp. 433-36), delivered a separate opinion concurring in the result and in all portions of the majority opinion except Section II.A.1. MOORE, J. (pp. 436-38), delivered a separate opinion concurring in part and dissenting in part.

OPINION

RICHARD D. CUDAHY, Circuit Judge. This is a tragic case. In November 2002, eighteen-year-old Ariel Perez, Jr. (Perez) hung himself from a bedsheet tied to a vent in his single cell in the Oakland County Jail in Pontiac, Michigan, resulting in his death three days later. Perez's father, plaintiff-appellant Ariel Perez, Sr. (Perez Sr.), the personal representative of Perez's estate, brought a 42 U.S.C. § 1983 action in the district court against the Oakland County, Michigan, caseworker/counselor at the jail Roberta Rice, the Oakland County Sheriff and several of his deputies and jail psychiatrist Sarath Hemachandra, M.D. Perez Sr. argues that the defendants violated Perez's Eighth Amendment right to be free from cruel and unusual punishment by failing to provide appropriate mental health treatment and suicide monitoring.[1] The defendants filed for summary judgment,

1. Perez did not discuss his claims against the Oakland County Sheriff and several of his deputies in this appeal. Thus, we consider those claims waived. *United States v. Isaiah*, 434 F.3d 513, 522 (6th Cir.2006). Additionally, we will not discuss the claims concerning Dr. Sarath Hemachandra, since both parties stipulated to a motion to dismiss appellee Dr. Hemachandra from this lawsuit based on a settlement agreement between the two parties. We granted this motion on June 27, 2006.

and the district court issued a memorandum opinion and order granting summary judgment on all of the federal claims and declining supplemental jurisdiction on all state-law claims. Perez Sr. timely appealed.

I. BACKGROUND

Perez's Prior Terms of Incarceration at Oakland County Jail

Perez was born in 1983. He did not complete high school and was diagnosed as having Attention Deficit Hyperactivity Disorder (ADHD) and as being learning disabled when he was six years old. Perez began serving sentences in the Oakland County Jail at a fairly young age. In February of 2001, when he was 17 years old, he pleaded guilty to two charges of felony larceny from a building and was given a six-month sentence on May 11, 2001. It was initially determined that due to Perez's age he should serve his time in a boot camp. However, after he reported to a boot camp counselor that he was experiencing hallucinations and hearing voices telling him to quit or escape, Perez was transferred to the Oakland County Jail in late June, 2001. When Perez arrived at the jail, he was met by defendant Roberta Rice, an inmate caseworker. Perez told Rice that he had been hearing voices for the past two years telling him to hurt himself, but he did not listen to the voices. He also stated that he had tried to hang himself at the ages of 14 and 17.

Rice determined that Perez should get a psychiatric evaluation, which was conducted by Dr. Sarath Hemachandra on July 5, 2001. Dr. Hemachandra noted Perez's history of hearing voices and considering suicide, his learning disability,

his ADHD diagnosis and the fact that Perez had taken Ritalin as a child. Dr. Hemachandra diagnosed Perez with schizoaffective disorder, a personality disorder and a learning disorder. He prescribed psychiatric medication, individual counseling and substance abuse counseling. He also noted that Perez should be "watched closely."

Perez was housed with a roommate and placed on a 30-minute "active behavior watch" (ABW), based on the assessments of Rice and Hemachandra. On July 10, 2001, Rice met with Perez because he was refusing to take his Zyprexa medication. Rice decided to discontinue the 30-minute ABW following this meeting.

On August 20, 2001, Perez was in a crisis state, and jail staff determined that he was suicidal. They placed him in an attorney booth until he could be seen by Rice. Rice met with Perez, and he indicated that he was considering hurting himself by cutting his wrist with a razor or hanging himself with a sheet. He said "I feel like I'm going crazy." Rice told Perez that she wanted him moved to the front holding tanks so that he could be closely supervised. He stated that he would commit suicide if he was placed in such a holding tank, but the move was made, and he was placed on an "active suicide watch" (ASW).

Rice met with Perez the next day, August 21, 2001. Perez stated that he felt better and wanted to be moved out of the holding cell. He indicated that he had no suicidal thoughts or intentions, and he said he would not cause trouble if moved to the main jail. Rice downgraded Perez's status from ASW to ABW. She thought he seemed stable, and she approved his reassignment to the main jail.

Rice again met with Perez on September 19, 2001, after Perez he been placed in an observation cell as a result of a fight he had had with another inmate. Perez stated that he was not suicidal, that he had been taking his medications and that he had been doing fine prior to the fight. Rice brought up the idea of Perez's being placed in a single cell due to his trouble getting along with other inmates, and Perez agreed to this. Rice also determined that Perez did not appear suicidal and no watch was necessary. Jail officials asked Rice if Perez could be placed in an 11-man cell, but she said this placement was inappropriate in light of Perez's age, mental health treatment and learning disability. Perez continued to be incarcerated without incident until his release on October 9, 2001.

Perez was again incarcerated at the Oakland County Jail for two days in late April, 2002, after an altercation with his father. While Perez was at the jail, Rice responded to a phone call from Perez's sister, Jennifer Perez. Jennifer Perez told Rice that Perez had not been compliant with his mental health treatment, that he had been hearing voices telling him that he was no good and that he should kill himself and that her father wanted Perez to get treatment. Rice gave Jennifer Perez the name of the medications Perez had been given while he was incarcerated and the phone numbers of Collaborative Solutions and Mercy Network. Perez was again incarcerated at the Oakland County Jail in late August 2002, but the reasons for this incarceration are not clear from the record.

Between his April and August incarcerations, Perez received treatment at St. Joseph Mercy Hospital and the North Oakland Medical Center (NOMC) for depression and suicidal

thoughts. A petition for hospitalization was prepared on Perez's behalf, a doctor diagnosed him as suffering from schizophrenia and he was given antipsychotic medication. Additionally, he was placed in a psychiatric ward at NOMC from mid-May through early June. In early October 2002, Perez went to the NOMC emergency room and stated that he was hearing voices telling him to hurt his sister and break into a restaurant. Perez was again diagnosed with schizophrenia and another petition for hospitalization was prepared on his behalf.

Incarceration Period During Which Perez Committed Suicide

On October 24, 2002, Perez returned to the Oakland County Jail after violating his probation. Early in the morning on October 25, 2002, Perez told a guard that he was hearing voices. He asked to speak to a counselor immediately but said he did not feel suicidal. A half hour to an hour later, Perez attempted suicide by tying his pants around his neck and the bars of his holding cell. A deputy placed Perez on ASW status, and he was placed in an observation cell. Rice came to see him soon after, and she continued the suicide watch. Perez was also seen by Dr. Hemachandra on an emergency basis that day. Perez told Dr. Hemachandra that he had attempted suicide in order to see a counselor and obtain medication (Lithium and Zypreza, which he had been taking prior to his incarceration) sooner. Dr. Hemachandra prescribed these medications and recommended that Perez be kept under close supervision.

Perez and Rice met on October 28, 2002, and Perez stated that he felt better since receiving the medication and that he

did not feel suicidal. He told Rice that he had not wanted to kill himself when he attempted suicide, but instead, he had made the attempt because he wanted to be taken out of the holding cell and given medication. Rice discontinued Perez's ASW status and approved his transfer back to the general prison population, finding that he was cooperative and his thought process appeared to be within the normal limits. He was moved to a 10-man cell on October 30, 2002.

On November 4, 2002, Rice and Perez met again, following a report she received that Perez was refusing to take his medication. Perez told Rice he thought he did not need the medication and that he had lied about his symptoms in the past in order to get the medication hoping that it would help him cope with his term in jail. He said he had been depressed in the past but that he had become a Christian and had a purpose in life. He further stated that he did not feel suicidal and that he wanted a cell assignment that would allow him to work on his General Educational Development Test (GED). Rice noted that Perez "appears manipulative in order to get his way," that he did not appear suicidal and that he "appears stable at this time." She determined no watch was needed.

On November 8, 2002, Perez was evaluated again by Dr. Hemachandra. Dr. Hemachandra's report from this session documented Perez's history of ADHD, cannabis dependence, suicide attempts, paranoia and mood swings. Dr. Hemachandra asked Perez if he had been hearing voices, and Perez said that he had not. He said he never had and that he lied about hearing voices in order to get medication to help his insomnia and depression. Dr. Hemachandra again

diagnosed Perez with schizoaffective disorder, cannabis dependence, a learning disorder and a personality disorder. He did not, however, find evidence of suicidal intent. Dr. Hemachandra recommended Perez be given individual counseling and substance abuse counseling. He also prescribed Zyprexa and Lithium for Perez and explained to Perez that it was important for him to take these medications.

On November 18, 2002, Perez met with Rice after Deputy John Jorganson requested Perez be approved for single cell housing because Perez had been stealing from other inmates in his 10-man cell. Perez admitted to Rice during their meeting that he had been stealing from the other inmates. Perez also told Rice that he was not taking his psychiatric medication since he believed he did not need it. Rice asked Perez why he had not discussed this decision with Dr. Hemachandra, and Perez responded by telling Rice that his cellmates encouraged him to continue getting the medication so that he could sell it to them. Perez stated he did not feel suicidal, he had frequent contact with his family and he was not feeling depressed or anxious. Rice found that Perez's "insight appears limited" and "judgment appears poor" but that he did not appear at risk of suicide, was stable and could be housed in a single cell without supervision.

The next day, November 19, 2002, Rice reviewed Perez's case with Dr. Hemachandra because of Perez's refusal to take his medication. Consistent with the standard protocol designed to minimize unused medication in the jail environment, Dr. Hemachandra discontinued Perez's medications but moved Perez's next scheduled psychiatric appointment up from November 29 to November 26.

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On November 22, 2002, in the evening, Deputy Michael Monroe was working in the C-Block area where Perez was housed. He was relieved that evening by Deputy Terry Montgomery. Clock rounds of Perez's cell were performed at 5:47 pm and 7:03 pm, a gap of 76 minutes. Perez was not on any kind of special watch. According to other inmates, Perez placed a sheet over his cell during this period, which blocked the view into the cell. After their 7:03 pm rounds, jail personnel discovered that Perez had hung himself with a bed sheet that had been tied to the vent of his cell. He died on November 26, 2002 from injuries sustained as a result of this action.

District Court Action

On January 14, 2003, Perez Sr. brought an action with respect to these events in the district court. The claim initially involved only Oakland County and its jail personnel, but Dr. Sarath Hemachandra and Roberta Rice were later added as defendants. Perez Sr. argued that the defendants violated Perez's Eighth Amendment right to be free from cruel and unusual punishment. He also filed state law claims with the district court.

Following discovery, all defendants filed motions for summary judgment. After Perez Sr. filed a brief in opposition to these motions, the district court issued a Memorandum Opinion granting summary judgment for the defendants and declining to exercise supplemental jurisdiction over the remaining state law claims. Perez Sr. filed a timely appeal with this court in April 2005.

Appendix A

II. DISCUSSION

This court reviews a district court's decision to grant summary judgment *de novo. Farhat v. Jopke*, 370 F.3d 580, 587 (6th Cir.2004); *Stemler v. City of Florence*, 126 F.3d 856, 866 (6th Cir.1997). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In deciding the motion, a court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). To withstand summary judgment, the non-movant must show sufficient evidence to create a genuine issue of material fact. *See Klepper v. First Am. Bank*, 916 F.2d 337, 342 (6th Cir.1990).

A. Claims Against Roberta Rice

Perez Sr. argues that the district court was correct when it found that there was a genuine issue of material fact as to whether Rice acted with deliberate indifference in violation of Perez's Eighth Amendment Rights, but the court erred when it found that Rice was nonetheless entitled to qualified immunity, and thus her motion for summary judgment should be granted.

1. Eighth Amendment Claim

Section 1983 prohibits any "person who, under color of any statute, ordinance, regulation, custom, or usage, of any

State" from depriving any U.S. citizen "of any rights, privileges, or immunities secured by the constitution and laws." Perez Sr. argues that Perez's Eighth Amendment right under the United States Constitution was violated. The Eighth Amendment prohibits the infliction of cruel and unusual punishment. U.S. Const. amend. VIII.

As applied to prisoners, this constitutional guarantee encompasses a right to medical care for serious medical needs, including psychological needs. *See Estelle v. Gamble*, 429 U.S. 97, 103-04, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). However, the Eighth Amendment prohibits mistreatment only if it is tantamount to "punishment," and thus courts have imposed liability upon prison officials only where they are "so deliberately indifferent to the serious medical needs of prisoners as to unnecessarily and wantonly inflict pain." *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 660 (6th Cir.1994). A serious medical need is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Blackmore v. Kalamazoo County*, 390 F.3d 890, 897 (6th Cir.2004) (citing *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 208 (1st Cir.1990)), *reh'g en banc denied.* Negligence or medical malpractice alone cannot sustain an Eighth Amendment claim, absent a showing of deliberate indifference. *Estelle*, 429 U.S. at 105-06, 97 S.Ct. 285.

"Deliberate indifference" as analyzed by this court has both an objective and a subjective component. *See Comstock v. McCrary*, 273 F.3d 693, 702 (6th Cir.2001). In cases involving an inmate's medical needs, the need "must be,

objectively, 'sufficiently serious.' " *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991)). In considering the subjective component, this circuit has emphasized that a plaintiff must produce evidence showing "that the official being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk." *Comstock*, 273 F.3d at 703. The subjective component requires that an official who actually knew of the serious medical need possessed "a sufficiently culpable state of mind in denying medical care." *Miller v. Calhoun County*, 408 F.3d 803, 813 (6th Cir.2005) (quoting *Farmer*, 511 U.S. at 834, 114 S.Ct. 1970). "Deliberate indifference requires a degree of culpability greater than mere negligence, but less than 'acts or omissions for the very purpose of causing harm or with knowledge that harm will result.' " *Id.* at 813, 114 S.Ct. 1970 (quoting *Farmer*, 511 U.S. at 835, 114 S.Ct. 1970). The Supreme Court has also said, "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Farmer*, 511 U.S. at 838, 114 S.Ct. 1970.

This court has held that "deliberate indifference may be established by a showing of grossly inadequate care as well as [by] a decision to take an easier but less efficacious course of treatment." *Terrance v. Northville Reg'l Psychiatric Hosp.*, 286 F.3d 834, 843 (6th Cir.2002) (quoting *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir.1999)). However, the 11th Circuit cases upon which *Terrance* was based note that a

showing of "grossly inadequate care" satisfies only the objective prong of the "deliberate indifference" standard. Plaintiff must still present evidence of a prison official's subjective awareness of, and disregard for, a prisoner's serious medical needs. *See Campbell v. Sikes*, 169 F.3d 1353, 1364-65 & n. 9 (11th Cir.1999). Additionally, in an en banc decision regarding a prison suicide, this circuit emphasized that the plaintiff had to show that the defendant prison psychiatrists must have known of, and yet disregarded, an excessive risk to inmate health or safety. *See Williams v. Mehra*, 186 F.3d 685, 692 (6th Cir.1999) (en banc).

Here, Perez Sr. argues that Rice violated Perez's Constitutional rights by failing to provide appropriate mental health treatment or monitoring while he was being held in the Oakland County Jail in the fall of 2002. The district court found, and we ultimately agree, that Perez Sr. showed a genuine issue of material fact as to whether Rice's conduct satisfied both the objective and subjective components of the deliberate indifference standard. We also agree with the district court, however, that this is a very close, and thus difficult, case.

Perez Sr. had to show that Rice was aware of a serious medical need (his mental illness as manifested in suicide risk) and that she acted with deliberate indifference to that need. A genuine issue of fact regarding the objective component of the standard can be met by a showing that Perez posed a strong likelihood of another suicide attempt. *See Gray v. City of Detroit*, 399 F.3d 612, 616 (6th Cir.2005); *Barber v. City of Salem*, 953 F.2d 232, 239-40 (6th Cir.1992). Perez had threatened and attempted suicide on several occasions in the

past and had been placed on behavior and suicide watches during his periods of incarceration at the Oakland County Jail. Perez attempted suicide in his cell in October 2002, only a month or so before his successful suicide in November 2002. This October attempt prompted Rice to place Perez in an observation cell under an active suicide watch and Dr. Hemachandra to recommend that Perez be kept under close observation. Additionally, Dr. Hemachandra testified that past threats or attempts at suicide are considered when determining whether an individual is suicidal, though someone who has previously considered or attempted suicide will not necessarily do so again. Dr. Hemachandra also testified that a patient who fails to take prescribed psychotropic medication posed a risk of becoming depressed, of inability to control moods and of becoming ultimately suicidal. *Perez v. Oakland County*, 380 F.Supp.2d 830, 841 (E.D.Mich.2005). Perez also presented expert testimony stating that individuals who suffer from schizophrenia and have made past suicide attempts are more likely than others to attempt suicide again. *Id.*

Despite this evidence, there are certainly reasons to doubt the objective conclusion that Perez posed a strong likelihood of another suicide attempt. Dr. Hemachandra, a trained and licensed psychiatrist, opined that Perez gave no indication of suicidal intention during his final evaluation on November 8, 2002. Additionally, Rice's counseling notes during the time period of early to mid-November show that Perez denied any suicidal intention, and they reflect Rice's conclusion that Perez was not suicidal or otherwise in need of an enhanced watch status. Ultimately, however, we find that viewing the facts in the light most favorable to the plaintiff, there is a

question of fact remaining as to whether there was a recognizable significant likelihood of Perez's attempting suicide.

The district court also correctly found that a genuine issue of fact remains on the subjective component of this inquiry-whether Rice acted with deliberate indifference to a serious medical need of which she was aware. Throughout her time treating Perez, Rice made the decision, on several occasions (most recently a month before he committed suicide), to place Perez on an elevated watch status and to house Perez in an observation cell or with roommate(s). Viewing this evidence in the light most favorable to Perez Sr., this evidence can be construed as demonstrating that Rice had the subjective knowledge, at least at times, that Perez posed a risk of suicide. Thus, there is a question of fact remaining whether Rice knowingly disregarded this risk by moving Perez to single cell housing on November 18, 2002, without first requesting a medical judgment from Dr. Hemachandra whether this placement was appropriate for Perez. Rice's notes of her November 18, 2002 counseling session can also be viewed as focusing unduly on Perez's problems with other inmates, without considering his mental health needs and whether he would be at risk of suicide if placed in a single cell. *Id.* at 842-43.

The district court also correctly found that Rice cannot rely on Dr. Hemachandra's November 8, 2002 assessment of whether Perez was suicidal (he determined that Perez was not on that date) because the situation did not remain stable between that date and the date Rice assigned Perez to a single cell. Rice learned during this time that Perez was refusing to

take his medication without Dr. Hemachandra's consent or direction and also that Perez was experiencing problems getting along with other inmates.

Once again, however, the record is not clear-cut on this issue. As the district court noted, a reasonable juror could construe Rice's November 4 and November 18, 2002 reports stating that Perez did not appear suicidal to mean that Rice did not subjectively perceive the danger posed by Perez's condition and thus could not have acted with deliberate indifference, whether or not she *should* have perceived such a risk, or whether or not she should have trusted her own non-medical judgment about Perez's state, given the changed circumstances since Dr. Hemachandra's most recent evaluation of Perez. However, we ultimately agree with the district court that viewing the evidence in the light most favorable to Perez Sr., as we are compelled to do (*see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)), there is a genuine question of material fact remaining as to whether Rice acted with deliberate indifference to Perez's serious medical needs.

Taken together, the evidence regarding the objective and subjective inquiries for deliberate indifference create a genuine issue of material fact whether Rice demonstrated deliberate indifference by disregarding a risk of known serious harm to Perez by making housing decisions for him without consulting a medical professional. This, however, is a conclusion which we can reach only with some reluctance in view of the uneven quality of the record.

Appendix A

2. Qualified Immunity Claim

Under the qualified immunity doctrine, "government officials performing discretionary functions generally are shielded from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Walsh v. Cuyahoga County*, 424 F.3d 510, 513 (6th Cir.2005) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). "[Q]ualified immunity [ ] is an immunity from suit, not just from an ultimate assessment of damages." *Archie v. Lanier*, 95 F.3d 438, 440 (6th Cir.1996) (citing *Mireles v. Waco*, 502 U.S. 9, 11, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991)). This immunity shields officials "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Myers v. Potter*, 422 F.3d 347, 352 (6th Cir.2005) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)), *reh'g & reh'g en banc denied* (Dec. 30, 2005).

"The purpose of the qualified immunity defense is to protect public officials 'from undue interference with their duties and from potentially disabling threats of liability.' " *Vakilian v. Shaw*, 335 F.3d 509, 516 (6th Cir.2003) (quoting *Blake v. Wright*, 179 F.3d 1003, 1007 (6th Cir.1999)). In *Skousen v. Brighton High Sch.*, this court noted that:

> the philosophy behind the doctrine of qualified immunity is a desire to avoid the substantial costs imposed on government, and society, by subjecting officials to the risks of trial. Such

> burdens include distraction of officials from their government duties, inhibition of discretionary action, and deterrence of able people from public service.

Skousen v. Brighton High Sch., 305 F.3d 520, 526 (6th Cir.2002) (internal quotation marks omitted).

In evaluating a qualified immunity defense, this court engages in a two-part analysis. We first determine whether, on the facts alleged, the official violated a constitutional or statutory right. *Walsh v. Cuyahoga Cty.*, 424 F.3d 510, 513 (6th Cir.2005) (citing *Sample v. Bailey*, 409 F.3d 689, 695 (6th Cir.2005)). We view the facts alleged in the light most favorable to the party seeking to defeat immunity, in this case Perez Sr. *Myers v. Potter*, 422 F.3d 347, 352 (6th Cir.2005). If the plaintiff does not establish the violation of a constitutional or statutory right, the inquiry ends there and the official is entitled to immunity. *See Midkiff v. Adams Cty. Reg. Water Dist.*, 409 F.3d 758, 771 (6th Cir.2005), *reh'g & reh'g en banc denied.*

Here, we have already determined that there is a genuine issue of fact as to whether Rice violated Perez's Eighth Amendment constitutional right. Thus, though it is a close case, we cannot hold that Rice is entitled to qualified immunity (on summary judgment) based on the first step of the qualified immunity analysis.

We thus move to the second step of the qualified immunity test; we determine whether the right violated was "clearly established" at the time of the violation. *Myers*, 422

F.3d at 352 (citing *Estate of Carter v. City of Detroit*, 408 F.3d 305, 310 (6th Cir.2005)). The burden of showing that the right was clearly established "rests squarely with the plaintiff." *Key v. Grayson*, 179 F.3d 996, 1000 (6th Cir.1999) (quoting *Cope v. Heltsley*, 128 F.3d 452, 459 (6th Cir.1997)).

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Moreover, the plaintiff must show that the right was clearly established "in light of the specific context of the case, not as a broad general proposition." *Id.* at 201, 121 S.Ct. 2151. If reasonable officers could disagree about the lawfulness of the conduct in question, immunity must be recognized. *Key*, 179 F.3d at 1000.

In order to determine if the law is clearly established such that a reasonable official could determine that her actions were unlawful, we look principally to the law of this circuit and to the Supreme Court. *Lavado v. Keohane*, 992 F.2d 601, 606 (6th Cir.1993); *Poe v. Haydon*, 853 F.2d 418, 423-24 (6th Cir.1988). However, we have held that the lack of Supreme Court or Sixth Circuit precedent "is not a sufficient condition for concluding that the law is unclear on the subject and [thus that] qualified immunity must be granted to a defendant." *McCloud v. Testa*, 97 F.3d 1536, 1556 (6th Cir.1996). "[T]he decisions of other courts can also clearly establish the law[,] but they must point [unmistakably] to the unconstitutionality of the conduct and be so clearly foreshadowed by applicable direct authority as to leave no

doubt in the mind of a reasonable officer that his conduct was unconstitutional." *Summar v. Bennett*, 157 F.3d 1054, 1058 (6th Cir.1998) (internal citation omitted).

For a right to be clearly established, "there need not be a case with the exact same fact pattern, or even 'fundamentally similar' or 'materially similar' facts; rather, the question is whether the defendants had 'fair warning' that their actions were unconstitutional." *Cummings v. City of Akron*, 418 F.3d 676, 687 (6th Cir.2005) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)). *Cf. United States v. Lanier*, 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) ("general statements of the law are not inherently incapable of giving fair and clear warning, and in [some] instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful")(internal citation omitted); *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir.2003) ("an action's unlawfulness can be apparent from direct holdings, from specific examples described as prohibited, or from the general reasoning that a court employs").

For Perez Sr., this precedent taken together means he must show that binding authority would have alerted reasonable people in Rice's position that her conduct was unlawful. In the context of a prisoner's Eighth Amendment medical-care claim, such precedent had to alert Rice that her conduct was deliberately indifferent to a strong likelihood that Perez would try to kill himself.

We ultimately find that Rice is entitled to qualified immunity because no law exists that would clearly establish for a person in Rice's position that she was violating Perez's Eighth Amendment rights. Perez Sr. is correct that Perez's right not to have prison officials treat his known serious medical need with indifference, including psychiatric and psychological counseling and medication, was clearly established by binding case law at the time of his death in November 2002. In April 2002 we stated the applicable general proposition: "It is well settled that the 'deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain ... proscribed by the Eighth Amendment.' " *Terrance v. Northville Reg'l Psychiatric Hosp.*, 286 F.3d 834, 843 (6th Cir. Apr.8, 2002) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). This court has also said more specifically that "a prisoner's 'psychological needs may constitute serious medical needs, especially when they result in suicidal tendencies.' " *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir.2001) (quoting *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 660 (6th Cir.1994)).

These established principles, however, were not enough, on their own, to alert a reasonable caseworker that Rice's conduct was deliberately indifferent under the circumstances. "[W]e do not assess the right violated at a high level of generality, but instead, we must determine whether the right [is] 'clearly established' in a more particularized . . . sense." *Myers v. Potter*, 422 F.3d 347, 356 (6th Cir.2005) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). "Because most legal rights are 'clearly established' at some level of generality, immunity

would be impossible to obtain if a plaintiff were required only to cite an abstract legal principle that an official had 'clearly' violated." *Martin v. Heideman*, 106 F.3d 1308, 1312 (6th Cir.1997).

For example, in *Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004), the Supreme Court evaluated the qualified immunity claim of an officer who had shot an individual who had been attempting to flee from law-enforcement officers in motor vehicles. The Supreme Court found the "cases relevant to the 'situation [Brosseau] confronted' " to be ones that considered "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Id.* at 200, 125 S.Ct. 596 (quoting *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). *Brosseau* has been interpreted to mean "that the law is not clearly established when it is 'heavily dependent on the specific facts of each case and no case squarely addresse[s] the facts of this case.' " *Lyons v. City of Xenia*, 417 F.3d 565, 579 (6th Cir.2005) (citing *Randall v. City of Fairbanks*, 352 F.Supp.2d 1028, 1037 (D.Alaska 2005)).

In *Comstock v. McCrary*, 273 F.3d 693 (2001), this court held that once a prisoner has been deemed suicidal, it is clearly established that the prisoner is entitled to continuing medical treatment. Here, Perez was not deemed to be suicidal at the time he was moved to the single cell. Additionally, Perez was not generally deprived of medical treatment involving his mental health needs. Thus, Perez Sr. would have to prove that his son's right to have his serious medical needs treated without deliberate indifference encompassed

a right to a correct assessment of his suicide risk or an effective suicide-monitoring arrangement. *See Danese v. Asman*, 875 F.2d 1239, 1244 (6th Cir.1989) ("The 'right' that is truly at issue here is the right of a detainee to be screened correctly for suicidal tendencies and the right to have steps taken that would have prevented suicide. The general right to medical care, for example, is not sufficient to require a police officer to have known that he had to determine that Danese was seriously contemplating suicide and stop him from following through."). Perez identifies no pre-November 2002 published decision of the U.S. Supreme Court or this court requiring such a determination, nor have we found any.

If no binding precedent is available that directly holds that conduct materially or fundamentally similar to Rice's was unlawful in October-November 2002 under the circumstances, as is the case here, the court may still find that Rice violated a clearly established right through one other avenue: showing "a generally applicable principle from either binding or persuasive authorities whose 'specific application to the relevant controversy' is 'so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct was unconstitutional.' " *High v. Fuchs*, 74 Fed.Appx. 499, 502 (6th Cir.2003) (quoting *Summar v. Bennett*, 157 F.3d 1054, 1058 (6th Cir.1998)).

However, Perez Sr. failed to show such a principle. On the contrary, by October 2002 this circuit's published case law had established that inmates have no general right to be correctly screened for suicidal tendencies. *Danese v. Asman*, 875 F.2d 1239, 1244 (6th Cir.1989), *cited by Davis v. Fentress*

County, 6 Fed.Appx. 243, 249 (6th Cir.2001) ("Nor has this court recognized a generalized right of a prisoner to be protected against committing suicide."). The circuit's published case law also held that "the generalized right of a prisoner to be free from deliberate indifference [to a known serious medical need] cannot support a finding that there was a clearly established right to be protected from committing suicide." *Rich v. City of Mayfield Heights*, 955 F.2d 1092, 1096-97 (6th Cir.1992).

We acknowledge that Rice may have demonstrated poor judgment in several ways. She made critical decisions based ultimately on her own assessment of Perez's risk of suicide, even though she had suicide-detection and prevention training but no advanced psychiatry or psychology degree; she may have underestimated Perez's risk of suicide; additionally, making a cell-assignment decision or recommendation without first consulting Perez's treating physician or prison psychiatrist Hemachandra may have been ill-advised. These arguable errors might make Rice liable for negligence or negligent infliction of emotional distress, but those are properly the subject of state-law tort claims, not an Eighth Amendment claim. We find no case law to suggest that any of these errors clearly violated Perez's Eighth Amendment rights.

Finally, we must consider Perez Sr.'s claim that Rice is not entitled to qualified immunity because her conduct involved performance of a ministerial, rather than a discretionary, function. It is well established that only officials performing discretionary, as opposed to ministerial, functions, are entitled to qualified immunity. *Davis v. Holly*,

835 F.2d 1175, 1178 (6th Cir.1987). However, we decline to address the merits of this argument because Perez Sr. waived this issue by not raising it at the district court. We do not consider an argument raised for the first time on appeal unless the party shows that refusal to consider the argument would result in a miscarriage of justice. *United States v. Isaiah*, 434 F.3d 513, 522 (6th Cir.2006). Perez Sr. does not argue that such a miscarriage of justice would occur here, and we do not believe it would. Perez Sr.'s only reply to Rice's waiver argument is "[t]he issue most certainly is properly before the Court. Rice brought her motion for summary judgment, in part, based on a qualified immunity argument. The District Court held she is entitled to qualified immunity. [Perez Sr.] filed an appeal which challenges that Rice is entitled to qualified immunity." (Pl.'s Reply Br. 22). Perez Sr.'s argument fails because he had a chance to respond to Rice's motion for summary judgment in the district court and did not raise the ministerial function argument. Because this specific argument was made for the first time on appeal and our decision not to address the issue does not result in a miscarriage of justice, we decline to consider the issue. *See Isaiah*, 434 F.3d at 522. For these reasons, we find that the district court was correct in granting summary judgment for Rice based on her entitlement to qualified immunity.

B. § 1983 Claim Against Oakland County

Plaintiff brought a federal § 1983 claim against Defendant Oakland Country. A municipality (or in this case a county) "cannot be held liable under § 1983 for an injury inflicted solely by its employees or agents." *Gregory v. Shelby County*, 220 F.3d 433, 441 (6th Cir.2000) (citing *Monell v.*

Dep't of Social Servs., 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). In *Monell*, the Supreme Court held that a municipality can, however, be found liable under § 1983 where a policy of the municipality itself causes the constitutional violation at issue. The Court said, "[i]t is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694, 98 S.Ct. 2018. This court has likewise said, "[f]or liability to attach, there must be execution of a government's policy or custom which results in a constitutional tort." *Gregory* 220 F.3d at 441. Additionally, Perez Sr. must show that "through its deliberate conduct, the [County] was the 'moving force' behind" the violation of his constitutional rights-that is, he "must show that the [County's] action was taken with the requisite degree of culpability and must demonstrate a direct casual link between the [County's] action and the deprivation of federal rights." *Gregory*, 220 F.3d at 442 (quoting *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 405, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997)).

The "deliberate indifference" standard applies to the County. *See Gray v. City of Detroit*, 399 F.3d 612, 616-18 (6th Cir.2005); *Barber v. City of Salem*, 953 F.2d 232, 238-40 (6th Cir.1992). The County has "a duty . . . to recognize, or at least not to ignore, obvious risks of suicide that are foreseeable," and to take reasonable steps to prevent an inmate's suicide "[w]here such a risk is clear." *Gray*, 399 F.3d at 618. However, "[d]eliberate indifference remains distinct from mere negligence. Where a city does create reasonable policies, but negligently administers them, there is no deliberate indifference and therefore no § 1983 liability."

Gray, 399 F.3d at 618 n. 1 (6th Cir.2005). " '[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. at 410, 117 S.Ct. 1382. In evaluating § 1983 claims against counties, we consider legitimate governmental interests such as "the allocation of resources," including "time, personnel, and money." *Roberts v. City of Troy*, 773 F.2d 720, 725 (6th Cir.1985).

Here, Perez Sr. must identify an Oakland County policy or custom that demonstrated deliberate indifference to the serious mental health needs of inmates at the County Jail. Liability would rest, if at all, on the actions of Rice in the context of the County's policy, since we found that she violated Perez's Eighth Amendment rights. *See Watkins v. City of Battle Creek*, 273 F.3d 682, 687 (6th Cir.2001). Perez Sr. argues that the County policy that demonstrates deliberate indifference and that is a violation of the Eighth Amendment is allowing non-medical personnel such as Rice to make the ultimate decision about the housing assignments of mentally ill inmates.

The district court found that Perez Sr. failed to show a genuine issue of fact as to whether the County demonstrated deliberate indifference by allowing case workers like Rice to make housing decisions that sometimes implicated the medical needs of inmates. *Perez v. Oakland County et al.*, 380 F.Supp.2d 830, 851 (E.D.Mich.2005). We agree. Perez Sr. provides no evidence that this practice has ever resulted in a suicide or attempted suicide by another inmate, either at the County Jail or in another jail across the country. It does

not seem "obvious," as Perez Sr. argues (Pl.'s Br. 59), that allowing a caseworker well-trained in mental health needs and suicide[2] to occasionally make housing decisions that affect the mental health of inmates would result in a suicide, and the lack of statistics to support this conclusion furthers the argument that there was a lack of foreseeability. *See Gray*, 399 F.3d at 619 (finding no deliberate indifference partly because the plaintiff's decedent was the only individual who had committed suicide in a City of Detroit facility in the past 20 years). We agree with the district court that supplying expert testimony that the County's practice is inadequate and poses a risk to inmates does not support the conclusion that the County acted with deliberate indifference to Perez's mental health needs, though it might support the conclusion that the County was negligent. A finding of negligence does not satisfy the deliberate indifference standard. *See Gray*, 399 F.3d at 618 n.1; *Molton v. City of Cleveland*, 839 F.2d 240, 246 (6th Cir.1988).

Perez Sr. also argues, in support of its position of deliberate indifference, that the County's policy of allowing

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2. Between Rice's hiring by the jail in 1994 and the decedent's suicide in November 2002, Rice took courses in Suicide Assessment and Prevention, Understanding Suicide-Nonverbal and Circumstantial Clues; Handling the Mentally Ill on the Street or in Lockup; Suicide Awareness and Handling Aggressive Behavior; Non-violent Crisis Intervention; Dealing with the Frustrating Client; Psychiatric Emergencies; Understanding Depression; Anger and Aggressiveness; Suicide Assessment and Interventions Strategies; Recognition/De-escalation of Violent Clients; Angry Adolescents; Personality Disorders in Social Work and Health Care; Understanding Anger; Understanding Anxiety; and Assessment/Treatment of Obsessive-Compulsive and Body Dysmorphic Disorders. (J.A. 377).

a caseworker like Rice, as opposed to a medical professional, to make screening and placement decisions, is unusual. ("Critical decisions as to the care and treatment of these mentally ill inmates are not typically made by non-medical officials."). (Pl.'s Br. 59). This statement is contrary to Perez Sr.'s own expert, Dr. Houston, who testified that such prisoner screening and placement decisions are commonly made by non-medical officials in prisons across the country, although he apparently considered that practice ill-advised:

> Q. So is it your testimony that the practice across this country in county jails is that most county jails are in conformance or nonconformance with this standard?
>
> A. As you have phrased it, not in conformance.
>
> Q. Because the vast majority of county jails out there have individuals who are trained in suicide identification and prevention who are not psychiatrists, correct?
>
> A. Correct.
>
> Q. And these people every day make determinations whether or not somebody is suicidal or potentially suicidal, correct?
>
> A. Correct.
>
> Q. Good. And you would agree that across this country, the vast majority of decisions as to

> whether or not an individual is suicidal or potentially suicidal are not made by psychiatrists or clinical psychologists in the county jail correctional setting, correct?
>
> A. Correct.

JA 347-48 & 349.

Perez Sr. also fails to show a genuine question as to whether there was a "direct casual link between the [County's] action and the deprivation of federal rights." *Gregory*, 220 F.3d at 442. In fact, Perez Sr. seems to be arguing, at least in parts of his brief, that if Rice simply followed the County's policy and left Perez in the ten-man cell, it is unlikely that Perez would have committed suicide:

> Pursuant to the policy, Perez should have never been housed in a single cell without any special watch. . . . What Rice did when she placed Perez in a single cell without any special watch and with the tools necessary for Perez to easily harm himself [presumably the bedsheet] was the worst possible thing she could have done. *Arguably, doing nothing and maintaining the status quo* [by keeping Perez in the ten-man cell] *would not have been good, but Perez would probably be alive today.*

(Pl's Br. 28) (emphasis added). Perez Sr. contends that by placing the decedent in a single cell just before his suicide, caseworker Rice " *wholly disregarded jail policy* " (Pl's Br.

27) (emphasis added) requiring that "inmates indicating potentially suicidal behavior shall be housed in a multiple cell with appropriate supervision watch recommended." *Id.* (quoting J.A. 592, Perez Sr. Opp'n to SJ, Ex. 28, Cty. Jail Policy # 58 dated Feb. 25, 1987). Further, Perez Sr. argues "Rice was aware of jail policies regarding housing of mentally ill inmates and potentially suicidal inmates, yet she disregarded them. . . . Rice's conduct can basically be summarized as follows: first, *she ignored jail policy* regarding the housing of potentially suicidal inmates. . . . It simply cannot be objectively reasonable to completely disregard a written jail policy regarding housing." *Id.* at 35-36. These arguments and evidence further suggest a lack of a link between County policy and Perez's suicide. In fact, they suggest that, if another case worker had simply followed County policy, Perez's suicide could have been prevented. Thus, while these arguments may provide further support of Rice's negligence, they indicate that there may not even have been a link between County policy and Perez's suicide.

For these reasons, we find that the district court was correct in granting Oakland County summary judgment.

III. CONCLUSION

For the reasons stated above, we AFFIRM the district court's grant of summary judgment for Roberta Rice and for Oakland County.

Appendix A

CONCURRENCE

GRIFFIN, Circuit Judge, concurring. I concur in the result and join in all portions of the lead opinion except Section II.A.1. Specifically, I join in affirming summary judgment for Oakland County for the reasons stated by Judge Cudahy. I also join in affirming summary judgment for prison caseworker Roberta Rice on the basis of qualified immunity because it would not have been "clear to a reasonable [person in her position] that [her] conduct was unlawful in the situation [she] confronted." *See Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); *see also Baranski v. 15 Unknown Agents of the BATF*, 452 F.3d 433, 447 (6th Cir.2006) (en banc) (a government agent is entitled to qualified immunity unless he violates a "clearly established" constitutional right).

I respectfully disagree, however, with Judge Cudahy's conclusion that Perez established a genuine issue of material fact with regard to whether Rice's conduct violated the Eighth Amendment (Section II.A.1.). In my view, the record does not support the allegation that Rice acted with deliberate indifference[1] to Perez's known serious medical need as we have defined that term in the context of prisoner suicide.

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1. This cumbersome phrase is necessary because the Eighth Amendment does *not* give a prisoner a "right to adequate medical care" *per se*. Inadequate care may or may not support a finding that the provider acted with deliberate indifference rather than some less culpable *mens rea*, such as negligence. *See Estate of Carter v. City of Detroit*, 408 F.3d 305, 312 (6th Cir.2005) ("Deliberate indifference is not mere negligence."); *see, e.g., Clark-Murphy v. Foreback*, 439 F.3d 280, 291 (6th Cir.2006) ("On these facts, it is doubtful that negligence could be proved, much less deliberate indifference.").

Appendix A

The lead opinion asserts that "[a] genuine issue of fact regarding the objective component of the [deliberate indifference] standard can be met by showing that Perez posed *a strong likelihood* of another suicide attempt." (Emphasis added.) The lead opinion correctly states the legal standard for deliberate indifference in the prisoner-suicide context. In our circuit,

> the proper inquiry concerning the liability of a City and its employees in both their official and individual capacities under section 1983 for a jail detainee's suicide is: whether the decedent showed a *strong likelihood* that he would attempt to take his own life in such a manner that failure to take adequate precautions amounted to deliberate indifference to the decedent's serious medical needs.

Gray v. City of Detroit, 399 F.3d 612, 616 (6th Cir.2005) (emphasis added) (quoting *Barber v. City of Salem*, 953 F.2d 232, 239-40 (6th Cir.1992)).

But the record simply does not show a genuine issue as to whether Perez satisfied this standard. Again, to conclude that Rice violated Perez's Eighth Amendment rights, it is not enough to establish that she may have acted with deliberate indifference to some possibility of suicide, or even a likelihood of suicide. This is a critical distinction: the record might show a genuine issue as to whether Rice acted with deliberate indifference to a real, even a substantial risk of suicide, but it does not permit a reasonable factfinder to conclude Rice was aware of a *strong likelihood* of suicide

and acted with deliberate indifference to *that* very high level of risk.

As the lead opinion notes,

> *there are certainly reasons to doubt the objective conclusion that Perez posed a strong likelihood of another suicide attempt.* Dr. Hemachandra, a trained and licensed psychiatrist, opined that Perez gave no indication of suicidal ideation during his final evaluation on November 8, 2002. Additionally, Rice's counseling notes during the time period of early to mid-November show that Perez denied any suicidal intention, and they reflect Rice's conclusion that Perez was not suicidal or otherwise in need of an enhanced watch status.

I agree, and the record does not create a genuine issue as to whether Perez posed a *strong* likelihood of another suicide attempt *at that particular time.* Judge Cudahy approves the district court's view that

> Rice cannot rely on Dr. Hemachandra's November 8, 2002 assessment of whether Perez was suicidal (he determined that Perez was not on that date) because the situation did not remain stable between that date and the date Rice assigned Perez to a single cell. Rice learned during this time that Perez was refusing to take his medication without Dr. Hemachandra's consent or direction, and also that Perez was experiencing problems getting along with other inmates.

The lead opinion does not explain, however, how knowledge that Perez was not getting along with other inmates equates or necessarily leads to knowledge that there was a strong likelihood that he would try to kill himself. Judge Cudahy does not identify any expert opinion or other evidence that supports such a correlation. With regard to Rice learning that Perez had been refusing to take his medication since his November 8 visit to Hemachandra, it is important to note *why* Perez apparently refused to take the medication during that period. As Rice knew from her own conversation with Perez just before the fateful housing decision, the reason Perez eschewed the medication was simply because he did not feel suicidal and had plans to improve his life on various fronts.

As permitted by her employer, Rice participated in monitoring and interacting with Perez and making treatment and related housing decisions. The record does not suggest that her final housing and behavior-watch decisions were taken with deliberate indifference to a strong likelihood of suicide-even assuming arguendo that there *was* such a strong likelihood. "Where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law." *Westlake v. Lucas*, 537 F.2d 857, 860 n. 5 (6th Cir.1976). Judge Cudahy's attempt to establish the genuine possibility that Rice perceived such a strong likelihood of suicide at the relevant time is unavailing. The lead opinion asserts,

> Throughout her time treating Perez, Rice made the decision, on several occasions (most recently

> a month before he committed suicide), to place Perez on an elevated watch status and to house Perez in an observation cell or with roommate(s). Viewing this evidence in the light most favorable to Perez Sr., this evidence can be construed as demonstrating that Rice had the subjective knowledge, *at least at times*, that Perez posed a risk of suicide.

The fact that Rice knew Perez was or might be suicidal at earlier times simply does not support the inference that Rice knew that Perez posed a risk of suicide *at the later time*, when Perez appeared and claimed to be in a much-improved state of mind.

As a caseworker who had both some relevant training and familiarity with Perez, Rice acted in reliance on her interaction with and observation of Perez, and on Perez's repeated, very recent statements that (1) he had lied about wanting to commit suicide, seeking only to obtain medication to help him cope with incarceration rather than his medical condition, (2) he had continued lying about his suicidal ideation and mental state (to both Hemachandra and Rice) in order to obtain medication to sell to fellow prisoners, (3) he believed that he still did not need, and so was refusing to take, that medication, and (4) he had a newfound religious faith that gave him purpose, as well as a desire to better himself and prepare for the future by earning a GED. *Cf. Soles v. Ingham Cty.*, 316 F.Supp.2d 536 (W.D.Mich. 2004) (mental-health worker was entitled to summary judgment on § 1983 claim; although she knew prisoner had recently attempted suicide and still reported feeling somewhat

depressed, she was not deliberately indifferent by returning prisoner from observation cell to general population, where examination five days earlier showed "significant improvement in [prisoner's] mood and attitude," prisoner "seemed less agitated and told her he had not experienced suicidal thoughts for at least a week," and guards contemporaneously reported that prisoner "had been less withdrawn and was interacting more normally with others"), *aff'd*, 148 Fed.Appx. 418 (6th Cir.2005). Accordingly, this was not a case where the most recent information available to the prison official suggested a likelihood-let alone a *strong* likelihood-of suicide. This information, in fact, suggested quite the opposite.

Finally, the lead opinion asserts,

> Dr. Hemachandra testified that past threats or attempts at suicide are considered when determining whether an individual is suicidal, though someone who has previously considered or attempted suicide will not necessarily do so again. Dr. Hemachandra also testified that a patient who fails to take prescribed psychotropic medication posed a risk of becoming depressed, unable to control his moods, and ultimately suicidal. *Perez v. Oakland County et al.*, 380 F.Supp.2d 830, 841 (E.D.Mich.2005). Perez also presented expert testimony stating that individuals who suffer from schizophrenia and have made past suicide attempts are more likely than others to attempt suicide again.

Hemachandra's opinion on this subject may be correct. It may also be that prison caseworkers such as Rice should be familiar with these alleged statistical trends and should take them into account when evaluating a prisoner with a history of schizophrenia, attempted or threatened suicide, and/or refusal to take prescribed medication. But Judge Cudahy does not rely on any evidence that *Rice* was in fact aware of these general indicators of increased risk. This omission is significant, because it is Rice's knowledge and perception of Perez's imminent likelihood of suicide that is relevant, not the opinion of Hemachandra or anyone else about Perez's suicide risk factors. *Cf. Horn by Parks v. Madison Cty. Fiscal Ct.*, 22 F.3d 653, 661 n. 2 (6th Cir.1994).

With regard to Perez's known failure to take his medication in the period between his last Hemachandra visit and his last Rice visit, the record shows merely that Rice must have credited Perez's insistence that he no longer *needed* the medication because he did not wish to kill himself. Admittedly, it may have been unwise to credit Perez's characterization of his state of mind and his explanation for discontinuing his medication, particularly in light of his history and his unmedicated state itself. If so, that means only that Rice may have been negligent in *failing* to perceive a strong likelihood of suicide. If one fails to perceive a strong likelihood, one cannot then be *deliberately* indifferent to it. *Farmer v. Brennan*, 511 U.S. 825, 838, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) ("[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment."); *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir.2001).

Appendix A

In summary, Perez failed to carry his burden of establishing a genuine issue of material fact that an objectively strong likelihood of suicide existed at the time of the assignment to a single cell. Even if such a strong likelihood existed at that time, the surrounding circumstances and the most recent information available to Rice preclude a finding by a reasonable trier of fact that Rice was *aware* of such a likelihood and acted with deliberate indifference toward it. This is an additional and independent reason why Rice is entitled to immunity. Viewing the evidence in the light most favorable to the non-moving party, Perez has failed to establish that Rice committed a violation of the Eighth Amendment.

For these reasons, I concur in the result and join in all portions of the lead opinion, except Section II.A.1.

Appendix A

CONCURRING IN PART, DISSENTING IN PART

KAREN NELSON MOORE, Circuit Judge, concurring in part and dissenting in part. I agree with Judge Cudahy in Part II.A.1 that summary judgment should not be granted on the issue of whether Rice committed a constitutional violation. However, I do not believe that the grant of qualified immunity to Rice is justified in this case, and I therefore respectfully dissent.

We assess claims of qualified immunity according to a three-step test:[1]

> First, we determine whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiff[ ] show that a constitutional violation has occurred. Second, we consider whether the violation involved a clearly established constitutional right of which a reasonable person would have known. Third, we determine whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.

Sample v. Bailey, 409 F.3d 689, 695-96 (6th Cir.2005) (alteration in original) (quoting *Feathers v. Aey*, 319 F.3d

1. "[T]he . . . three-step approach correctly encompasses the Supreme Court's approach to qualified immunity claims and serves to ensure government officials the proper protection from civil suit under the law." *Sample v. Bailey*, 409 F.3d 689, 696 n. 3 (6th Cir.2005).

843, 848 (6th Cir.2003)). "Qualified immunity must be granted if the plaintiff cannot establish each of these elements." *Id.* at 696 (internal quotation marks omitted). Rice is not entitled to qualified immunity on the basis of the first step of this test, because it "there is a genuine issue of fact as to whether Rice violated Perez's Eighth Amendment constitutional right." Majority Op. at 427.

In analyzing the clearly-established prong of the test, the majority states that our precedents "were not enough, on their own, to alert a reasonable caseworker that Rice's conduct was deliberately indifferent under the circumstances." Majority Op. at 428. However, we have held that "once a prisoner has been deemed suicidal, it is clearly established that the prisoner is entitled to continuing medical treatment." Majority Op. at 428 (citing *Comstock v. McCrary*, 273 F.3d 693, 711 (6th Cir.2001), *cert. denied*, 537 U.S. 817, 123 S.Ct. 86, 154 L.Ed.2d 22 (2002)). The majority distinguishes this case from *Comstock* on the basis that "Perez was not deemed to be suicidal at the time he was moved to the single cell," and that Perez is thus alleging "a right to a correct assessment of his suicide risk or an effective suicide-monitoring arrangement." Majority Op. at 428 (citing *Danese v. Asman*, 875 F.2d 1239, 1244 (6th Cir.1989), *cert. denied*, 494 U.S. 1027, 110 S.Ct. 1473, 108 L.Ed.2d 610 (1990)). I do not agree with the characterization of the issue in this case as a mere question of screening, because it is based solely on Rice's conclusion at the November 18, 2002 meeting that Perez was not suicidal. As I will explain below, our precedent does not permit us to rely on Rice's summary dismissal of Perez's risk of suicide-in light of strong evidence to the contrary-to conclude that Perez was in fact "not deemed to

be suicidal." Majority Op. at 428. Instead, I believe that the record compels the conclusion that this case is analogous to and governed by *Comstock* and that the right in question was clearly established well before the events in question here.

We are required to view the facts in the light most favorable to Perez. *Comstock*, 273 F.3d at 701 n. 3. The record demonstrates that Perez "attempted suicide in his cell in October 2002, only a month or so before his successful suicide in November 2002." Majority Op. at 424-25; *see also* Joint Appendix ("J.A.") at 94 (Rice Dep. at 28). "To be sure, Dr. Hemachandra opined that [Perez] gave no indication of suicidal ideation during his final evaluation on November 8, 2002." *Perez v. Oakland County*, 380 F.Supp.2d 830, 841 (E.D.Mich.2005). However, in the time period following this meeting "Rice learned . . . that [Perez] had continued to refuse his medications, that he had not sought or obtained Dr. Hemachandra's approval of this course of action during their most recent session, and that he had experienced problems in a 10-man cell and had been stealing from his fellow inmates." *Id.* at 843; *see also* J.A. at 101-02 (Rice Dep. at 54-60). Also, "Rice presumably was aware that Plaintiff had never received any of the counseling recommended by Dr. Hemachandra." *Perez*, 380 F.Supp.2d at 843. In her meeting with Perez, Rice concluded that he was not suicidal; however, she also noted that his insight was limited and his judgment was poor. J.A. at 102 (Rice Dep. at 60). Finally, Perez presented expert testimony "stating that individuals who suffer from schizophrenia and have made past suicide attempts are more likely than others to attempt suicide again." Majority Op. at 7; J.A. at 569 (Letter from Emanuel Tanay, M.D., P.C., to Kenneth J. Wrobel, Jr. dated Jan. 22, 2004 at

10). Given these facts, we must assume that Perez was still at risk of suicide at the time of his meeting with Rice.

In order to determine that Perez was not suicidal at the time that he was moved to the single cell, the majority disregards all of the above-listed facts and focuses solely on Rice's November 18, 2002 determination. However, it is this determination itself and Rice's subsequent failure to seek medical advice that "constituted the deliberate indifference to [Perez's] serious medical needs."[2] *Comstock*, 273 F.3d at 704. The facts of this case are analogous to the situation presented in *Comstock*, because in that case McCrary (the defendant) released Montgomery (the decedent) from suicide watch on the basis of an interview in which Montgomery stated that he was not considering suicide. *Comstock*, 273 F.3d at 698-99. McCrary argued that he did not have subjective knowledge of Montgomery's risk of suicide; however, we held that "the proper analysis requires us to ask whether McCrary perceived that Montgomery was suicidal *when he commenced his evaluation of Montgomery* [on the day that Montgomery was released from suicide watch and subsequently committed suicide]." *Id.* at 704. Similarly, the proper analysis in this case requires consideration of all of the evidence available to Rice at the time that she made her determination to place Perez in a single cell. This evidence demonstrates that Rice was aware of Perez's risk of suicide and that Perez consequently had a clearly established right to continuing medical treatment.

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2. In fact, Judge Cudahy acknowledges that "Rice's notes of her November 18, 2002 counseling session can . . . be viewed as focusing unduly on Perez's problems with other inmates, without considering his mental health needs and whether he would be at a risk of suicide if placed in a single cell." Majority Op. at 425.

Finally, I believe that Rice acted objectively unreasonably in light of Perez's clearly established right to continuing medical treatment. As described above, Rice was aware of Perez's suicidal tendencies and the fact that he had previously been under close supervision because of these tendencies. *Perez*, 380 F.Supp.2d at 843 n. 10; *see also* J.A. at 99 (Rice Dep. at 45-46). The evidence-read in the light favorable to Perez-supports the conclusion that a reasonable person with Rice's knowledge would have sought medical advice before moving Perez to a single cell without special-watch status. I would accordingly reverse the district court's grant of summary judgment as to the issue of qualified immunity for Rice.

APPENDIX B — OPINION AND ORDER REGARDING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED MARCH 31, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 03-70171

Hon. Gerald E. Rosen

ARIEL PEREZ, SR., Personal Representative of the ESTATE OF ARIEL E. PEREZ, JR.,

Plaintiff,

v.

OAKLAND COUNTY, OAKLAND COUNTY SHERIFF'S DEPARTMENT, OAKLAND COUNTY SHERIFF MICHAEL J. BOUCHARD, ROBERTA RICE, DEPUTY MICHAEL MONROE, DEPUTY TERRY MONTGOMERY, DEPUTY JOHN JORGANSON, DR. SARATH HEMACHANDRA, and UNKNOWN OAKLAND COUNTY SHERIFF'S DEPUTIES,

Defendants.

Appendix B

OPINION AND ORDER REGARDING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

PRESENT: Honorable Gerald E. Rosen
United States District Judge

I. *INTRODUCTION*

Plaintiff Ariel Perez, Sr., the father and personal representative of the estate of Ariel Perez, Jr., commenced this suit in this Court on January 14, 2003, alleging that the Defendants-including Oakland County, its Sheriff's Department, the Oakland County Sheriff, three sheriff's deputies, a caseworker, and a psychiatrist-violated Ariel, Jr.'s rights under the U.S. Constitution by failing to provide appropriate mental health treatment or monitoring while he was being held in the Oakland County Jail in the fall of 2002.[1] Specifically, on November 22, 2002, while Plaintiff was incarcerated in this facility for a probation violation, he attempted suicide by hanging himself from a bed sheet tied to a vent in his cell. As a result of this attempt, Plaintiff died a few days later, on November 26, 2002. Plaintiff's complaint asserts federal constitutional claims under 42 U.S.C. § 1983, as well as state-law claims of gross negligence.

On April 2, 2004, the Oakland County Defendants-specifically, the County, its Sheriff's Department, the

1. Since Plaintiff Ariel Perez, Sr. has brought this suit on behalf of the estate of his deceased son, and since the incidents at issue in this case involve only Ariel Perez, Jr., the Court will henceforth refer to Ariel, Jr. as the "Plaintiff" in this action.

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Oakland County Sheriff, caseworker Roberta Rice, and sheriff's deputies Michael Monroe, Terry Montgomery, and John Jorganson-filed a motion for summary judgment, arguing that Plaintiff has failed to establish a violation of his Eighth Amendment rights, that the evidence does not support a claim of supervisory or municipal liability, and that the individual County Defendants are entitled to qualified immunity from liability. On March 31, 2004, Defendant Sarath Hemachandra, a psychiatrist who provided mental health services to Plaintiff while he was housed at the Oakland County Jail, also moved for summary judgment, arguing that there is no evidentiary basis for finding that he violated Plaintiff's Eighth Amendment rights. Both of these motions have been fully briefed by the parties.

On August 26, 2004, the Court met with counsel in chambers to address Defendants' motions. Having considered the statements of counsel at this conference, and having reviewed the parties' briefs and the other materials in the record, the Court is now prepared to rule on these motions. This Opinion and Order sets forth the Court's rulings.

II. *FACTUAL BACKGROUND*

The factual record in this case is largely undisputed. Plaintiff's decedent, Ariel Perez, Jr., was 19 years old on the date of his death by suicide, November 26, 2002. Prior to his death, Plaintiff had been diagnosed as suffering from mental illness, and he had been incarcerated at the Oakland County Jail on a number of occasions. This background will be briefly recounted here, as it is relevant to the incidents at issue in this case.

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A. Plaintiff's Prior Terms of Incarceration at the Oakland County Jail

Plaintiff's first period of incarceration at the Oakland County Jail spanned from November 16 to November 30, 2000. He then was incarcerated at this facility from April 14 through April 20, 2001. The record is not clear as to the reasons for these confinements, but they apparently passed without incident.

In February of 2001, Plaintiff pled guilty to two charges of felony larceny from a building, and he was given a six-month sentence on May 11, 2001. Plaintiff was 17 years old at the time, and it was determined that this sentence should be served at a boot camp. Plaintiff was returned to the Oakland County Jail in late June of 2001, however, after he reported to a boot camp counselor that he was experiencing hallucinations and hearing voices telling him to quit or escape. Upon returning to the jail, he was seen by Defendant Roberta Rice, an inmate caseworker. Plaintiff told Rice that he had been hearing voices for the past two years telling him to hurt himself, but that he did not listen to these voices. He also reported having tried to hang himself at ages 14 and 17.

Based on these issues, Plaintiff was sent for a psychiatric evaluation by Defendant Dr. Sarath Hemachandra on July 5, 2001. Dr. Hemachandra's examination report noted Plaintiff's history of hearing voices and considering suicide, and he also reported that Plaintiff had a learning disability, had been diagnosed as suffering from ADHD, and had taken Ritalin for several years as a child. Dr. Hemachandra diagnosed Plaintiff with a schizoaffective disorder, a personality

disorder, and a learning disorder, and he prescribed psychiatric medication, individual counseling, and substance abuse counseling.[2] More generally, Dr. Hemachandra opined that Plaintiff should be "watched closely." (Plaintiff's Response, Ex. 4, Hemachandra 7/5/2001 Evaluation Report.)

As a result of the assessments by Dr. Hemachandra and Rice, Plaintiff was housed with a roommate and placed on a 30-minute "active behavior watch" ("ABW"). This status was continued until July 10, 2001, when Rice met with Plaintiff upon learning that he was refusing to take his Zyprexa medication. Following this meeting, Rice discontinued the 30-minute ABW.

On August 20, 2001, Oakland County Jail personnel determined that Plaintiff was suicidal, and he was placed in an attorney booth until he could be seen by Rice. Plaintiff reported to Rice that he had been thinking about cutting himself with a razor or hanging himself with a sheet, and he requested placement in a single cell. Although Rice assured Plaintiff that his statements about suicide were being taken seriously, her notes reflect her view that Plaintiff was being "manipulative in order to get his way." (Plaintiff's Response, Ex. 9, Rice 8/20/2001 Report.) Rice also addressed Plaintiff's concerns about his medication, advising him that he could discuss the matter at his next scheduled psychiatric appointment on August 23, 2001. Finally, Rice informed Plaintiff that he would be moved to a front holding tank so that he could be closely supervised. Despite Plaintiff's

2. Plaintiff states that he was never given the counseling ordered by Dr. Hemachandra.

statement that he would kill himself if moved to the holding tanks, this placement was made and Plaintiff was put on an "active suicide watch" ("ASW").

The next day, Rice apparently met with Plaintiff and downgraded his watch status from ASW to ABW. Plaintiff met again with Rice on August 27, 2001, reporting that he felt better and wished to be moved out of the holding cell. Plaintiff denied any suicidal ideation, and he agreed not to cause trouble if he were moved to the main jail. Citing this promise of cooperation and his apparently stable condition, Rice approved Plaintiff for reassignment to the main jail, and she discontinued his ABW status.

Rice then met with Plaintiff on September 19, 2001, upon learning that he had been placed in an observation cell as a result of a fight with another inmate. Plaintiff reported that he was not suicidal, that he had been taking his medications, and that he was doing okay prior to the fight. Rice discussed with Plaintiff the possibility that he be placed in a single cell, in light of his difficulties in getting along with other inmates, and Plaintiff agreed to this proposal. Rice determined that Plaintiff did not appear suicidal, and that no watch was necessary. However, in response to a query by jail officials whether Plaintiff could be placed in an 11-man cell, Rice opined that this placement was inappropriate in light of Plaintiff's age, mental health treatment, and learning disability. Plaintiff's incarceration apparently continued without incident until his release on October 9, 2001.

Plaintiff next was incarcerated at the Oakland County Jail for two days in late April of 2002, apparently as a result

of an altercation with his father. While Plaintiff was being held, Rice spoke to his sister, who reported that Plaintiff had not been complying with his mental health treatment program, and that he was hearing voices telling him to kill himself. Rice informed Plaintiff's sister about the medications he had been given while housed at the jail, and she provided the phone numbers for two mental health treatment programs. Plaintiff also was incarcerated at the Oakland County Jail in late August of 2002, although the reasons for this are not clear from the record.

In the period between his incarcerations in April and August of 2002, Plaintiff received treatment at St. Joseph Mercy Hospital and the North Oakland Medical Center ("NOMC") for depression and suicidal thoughts. In connection with this treatment, a petition for hospitalization was prepared on Plaintiff's behalf, a physician diagnosed Plaintiff as suffering from schizophrenia, he was given antipsychotic medication, and he was placed in a psychiatric ward at NOMC from mid-May until early June. Similarly, in early October of 2002, shortly before his final incarceration at the Oakland County Jail, another petition for hospitalization was prepared on Plaintiff's behalf, after he appeared at the NOMC emergency room and reported that he was hearing voices telling him to hurt his sister and break into a restaurant. Plaintiff again was diagnosed with schizophrenia on this occasion.

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B. Plaintiff's Final Period of Incarceration at the Oakland County Jail

Against this backdrop, Plaintiff was booked into the Oakland County Jail on October 24, 2002 for violating his probation. Early the next morning, Plaintiff informed a guard that he was hearing voices and requested to speak to a counselor immediately, but he denied being suicidal. Just over an hour later, however, Plaintiff apparently attempted suicide by tying his pants around his neck and the bars of his holding cell. Plaintiff was placed in an observation cell, put on ASW status, and seen by Rice, who continued the suicide watch. Plaintiff also was seen by Dr. Hemachandra on an emergency basis that day, and he reportedly told the psychiatrist that he had attempted to hang himself in order to see a counselor sooner and to obtain the medications, lithium and Zyprexa, that he had been taking prior to his incarceration. Plaintiff denied any suicidal ideation or hallucinations, however. Dr. Hemachandra prescribed the medications sought by Plaintiff, and recommended that he be kept under close observation.

Plaintiff next met with Rice on October 28, 2002, reporting that he felt better since receiving his psychiatric medication, and denying any suicidal ideation. Regarding the recent hanging incident, Plaintiff again stated that he was not trying to hurt himself, but that he acted out of a desire to be moved out of the holding tank and given his medication. Following this meeting, Rice discontinued Plaintiff's ASW status and approved his transfer to the general prison population, finding that Plaintiff was cooperative and that

his thought processes appeared to be within normal limits.[3] On October 30, 2002, Plaintiff was moved to a 10-man cell.

Rice again met with Plaintiff on November 4, 2002, following a report that Plaintiff was refusing his psychiatric medication. On this occasion, Plaintiff reportedly stated that he did not need the medication, and that he had lied about his symptoms in the past in order to obtain medication that would help him to cope with his incarceration. Plaintiff acknowledged that he had been depressed in the past, but stated that he "became a Christian . . . and now has a purpose in his life." (Plaintiff's Response, Ex. 19, Rice 11/4/2002 Report.) Plaintiff also denied any suicidal ideation, and he sought a cell assignment that would permit him to work on his GED. Rice concluded that Plaintiff "appears manipulative in order to get his way," found that he did not appear suicidal and that he "appears stable at this time," and determined that no watch was needed. (*Id.*)

Plaintiff was evaluated by Dr. Hemachandra on November 8, 2002. In his report from this session, Dr. Hemachandra recounted Plaintiff's history of ADHD, cannabis dependence, suicide attempts, paranoia and mood swings. The psychiatrist also spoke to Plaintiff about his past reports of hearing voices, but Plaintiff responded that these reports were false, and that he merely wanted medication to help his depression and insomnia. As he had done back in July of 2001, Dr. Hemachandra again diagnosed Plaintiff as

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3. As noted by Plaintiff, once the ASW status was discontinued, Plaintiff's status was updated to "PSU," reflecting a prisoner who is not currently being watched but who has historically been considered potentially suicidal.

suffering from a schizoaffective disorder, as well as cannabis dependence, a learning disorder, and a personality disorder, but he found no evidence of suicidal ideation. Dr. Hemachandra recommended that Plaintiff be given individual counseling and substance abuse counseling.[4] He also prescribed Zyprexa and lithium, and, in light of his awareness that Plaintiff had not been taking his psychiatric medications, he stressed to Plaintiff the importance of taking these medications.

Plaintiff next met with Rice on November 18, 2002, as a result of a request by Defendant Deputy John Jorganson that Plaintiff be approved for single cell housing. According to Rice's report, Plaintiff had been stealing from other inmates in his 10-man cell, and he admitted to Rice that he had been stealing. Plaintiff also informed Rice that he was still refusing his psychiatric medication, and that he continued to believe this medication was not necessary. When asked why he had not discussed this matter with Dr. Hemachandra, Plaintiff reportedly stated that he had been urged by his cellmates to continue receiving the medication so that he could sell it to them.[5] More generally, Plaintiff denied any suicidal ideation, reported frequent visits and contact with his family, and stated that he was not experiencing any depression or anxiety. Rice concluded that Plaintiff's "insight appears limited" and "[j]udgement appears poor," but that he did not appear suicidal, was stable, and was appropriate

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4. Again, Plaintiff states that no such counseling was provided.

5. Plaintiff further stated that he ultimately decided not to go through with this scheme, and instead merely refused the medication when it was offered to him.

for single cell housing without any need for watch status. (Oakland County Defendants' Motion, Ex. C, Rice 11/18/2002 Report.)

The next day, November 19, 2002, Rice reviewed Plaintiff's case with Dr. Hemachandra, apparently in light of Plaintiff's continued refusal to take his psychiatric medications. Consistent with a standard protocol designed to minimize the amount of unused medication in the jail environment, Dr. Hemachandra discontinued Plaintiff's medications, but he advanced Plaintiff's next scheduled appointment with him from November 29 to November 26.

On the evening of November 22, 2002, Defendant Deputy Michael Monroe was working in the C-Block area of the Oakland County Jail where Plaintiff was housed, and he was relieved that evening by Defendant Deputy Terry Montgomery. As noted, Plaintiff was not on any sort of watch status at the time. The record indicates that "clock rounds" of Plaintiff's jail cell were performed at 5:47 p.m. and 7:03 p.m., a gap of approximately 76 minutes.[6] According to a fellow inmate, Plaintiff placed a sheet over his cell during this period, in order to block the view into his cell. Upon performing their 7:03 p.m. rounds, jail personnel discovered that Plaintiff had hung himself with a bed sheet that had been tied to the vent of his cell. He died from his injuries a few days later, on November 26, 2002.

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6. Plaintiff states that Oakland County Jail policy calls for "clock rounds" to be performed every 60 minutes, unless an inmate is on disciplinary or special watch status.

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III. *ANALYSIS*

A. The Standards Governing Defendants' Motions

Two motions presently are pending before the Court. Defendant Sarath Hemachandra has brought his motion under both Fed.R.Civ.P. 12(b)(6) and Fed.R.Civ.P. 56, while the Oakland County Defendants appeal solely to the latter rule. Because the Court has considered matters outside the pleadings, both motions will "be treated as [seeking] summary judgment and disposed of as provided in Rule 56." Fed.R.Civ.P. 12(b). Under this rule, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

Three 1986 Supreme Court cases- *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)-ushered in a "new era" in the federal courts' review of motions for summary judgment. These cases, in the aggregate, lowered the movant's burden in seeking summary judgment. *Celotex* explains:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing

> sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof.

Celotex, 477 U.S. at 322, 106 S.Ct. 2548.

After reviewing this trilogy of Supreme Court decisions, the Sixth Circuit adopted a series of principles governing motions for summary judgment:

> * Cases involving state of mind issues are not necessarily inappropriate for summary judgment.
>
> * The movant must meet the initial burden of showing "the absence of a genuine issue of material fact" as to an essential element of the non-movant's case. This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.
>
> * The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must "present affirmative evidence in order to defeat a properly supported motion for summary judgment."
>
> * The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.

> * The trial court has more discretion than in the "old era" in evaluating the respondent's evidence. The respondent must "do more than simply show that there is some metaphysical doubt as to the material facts." Further, "[w]here the record taken as a whole could not lead a rational trier of fact to find" for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is plausible.

Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir.1989). *See also Nernberg v. Pearce*, 35 F.3d 247, 249 (6th Cir.1994). The Court will apply these standards in resolving Defendants' motions.

B. Plaintiff's § 1983 Claims Against the Individual Defendants

1. The Standards Governing Eighth Amendment Claims

As the basis for his federal constitutional claims under 42 U.S.C. § 1983, Plaintiff cites the Eighth Amendment protection against the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. As applied to prisoners, this constitutional guarantee encompasses a right to medical care for serious medical needs, including psychological needs. *See Estelle v. Gamble*, 429 U.S. 97, 103-04, 97 S.Ct. 285, 290-91, 50 L.Ed.2d 251 (1976); *Comstock v. McCrary*, 273 F.3d 693, 702-03 (6th Cir.2001). Yet, because the Eighth Amendment prohibits only mistreatment tantamount to "punishment," the courts have

imposed liability upon prison officials only where they "are so deliberately indifferent to the serious medical needs of prisoners as to unnecessarily and wantonly inflict pain." *839 *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 660 (6th Cir.1994) (citing *Estelle*, 429 U.S. at 104, 97 S.Ct. at 291). Mere negligence or medical malpractice alone cannot sustain an Eighth Amendment claim, absent a showing of deliberate indifference. *See Estelle*, 429 U.S. at 105-06, 97 S.Ct. at 291-92; *Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir.1999) (*en banc*).

The "deliberate indifference" inquiry has both objective and subjective components. *See Comstock*, 273 F.3d at 702. First, in cases involving an inmate's medical needs, the need "must be, objectively, sufficiently serious." *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 1977, 128 L.Ed.2d 811 (1994) (internal quotations and citation omitted); *see also Estelle*, 429 U.S. at 104, 97 S.Ct. at 291. Regarding the subjective component, the Sixth Circuit has emphasized that a plaintiff must produce evidence showing "that the official being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk." *Comstock*, 273 F.3d at 703 (citing *Farmer*, 511 U.S. at 837, 114 S.Ct. at 1979). As the Supreme Court has explained, "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Farmer*, 511 U.S. at 838, 114 S.Ct. at 1979. This Court recently recognized that "the subjective prong of the 'deliberate indifference' standard is not easily met," as it requires evidence of what prison officials actually knew or

believed, and not merely what they should have perceived. *Joseph v. City of Detroit*, 289 F.Supp.2d 863, 872 (E.D.Mich.2003).

As Plaintiff points out, the Sixth Circuit has provided more specific guidance in applying this Eighth Amendment standard of "deliberate indifference" to cases of claimed medical mistreatment. In particular, "deliberate indifference may be established by a showing of grossly inadequate care as well as [by] a decision to take an easier but less efficacious course of treatment." *Terrance v. Northville Regional Psychiatric Hospital*, 286 F.3d 834, 843 (6th Cir.2002) (quoting *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir.1999)). This standard of "grossly inadequate care," in turn, has been described as "medical treatment 'so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness.' " *Terrance*, 286 F.3d at 844 (quoting *Waldrop v. Evans*, 871 F.2d 1030, 1033 (11th Cir.1989)).[7]

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7. This Court professes some confusion as to the panel's suggestion in *Terrance* that "less flagrant conduct" suffices to establish the "lower . . . standard" of deliberate indifference in "medical mistreatment cases." *Terrance*, 286 F.3d at 843, 847. Surely, medical professionals are not held to a more stringent legal standard than other prison officials in Eighth Amendment cases, and nothing in *Estelle* or its progeny could be construed as supporting such a view. To the contrary, *Estelle* itself emphasizes that medical mistreatment must be tantamount to the "unnecessary and wanton infliction of pain" in order to satisfy the "deliberate indifference" standard. *Estelle*, 429 U.S. at 104, 97 S.Ct. at 291 (internal quotations and citation omitted). Thus, to the extent that *Terrance* might be read as adopting a different standard of "deliberate indifference" than the Supreme Court announced in *Estelle*, the Court necessarily is bound to follow *Estelle*.

Yet, as emphasized in the very same line of Eleventh Circuit decisions relied upon in *Terrance*, a showing of "grossly inadequate care" satisfies only the ***objective*** prong of the "deliberate indifference" standard, and does not subsume or otherwise dispense with the distinct requirement that the plaintiff present evidence of a prison official's ***subjective awareness*** of, and disregard for, a prisoner's serious medical needs. *See Campbell v. Sikes*, 169 F.3d 1353, 1364-65 & n. 9 (11th Cir.1999) (casting doubt upon the decision in *Waldrop* in light of its apparent focus solely upon the objective prong of the "deliberate indifference" inquiry).[8] Similarly, in an *en banc* decision in a prison suicide case, the Sixth Circuit emphasized that the defendant prison psychiatrists must have known of, and yet disregarded, an excessive risk to inmate health or safety. *See Williams*, 186 F.3d at 691-92 (*en banc*); *see also Comstock*, 273 F.3d at 703 (observing that the subjective element of the "deliberate indifference" test "is meant to prevent the constitutionalization of medical malpractice claims"). Against this legal backdrop, the Court turns to Plaintiff's specific claims against the individual Defendants.

2. Plaintiff's Eighth Amendment Claims Against Defendants Rice and Hemachandra

Although Plaintiff has named both health care professionals and prison guards as Defendants, the Court believes it appropriate to separately analyze the claims against

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8. Notably, while the panel in *Terrance* stated that it was "guided by" the Eleventh Circuit's decision in *Waldrop*, *see Terrance*, 286 F.3d at 844, it failed to observe that the Eleventh Circuit itself had called this ruling into question in *Campbell*.

these two categories of parties. Specifically, as to Defendants Roberta Rice, an inmate caseworker at the Oakland County Jail, and Dr. Sarath Hemachandra, a psychiatrist who provides mental health services to prisoners housed at the jail, Plaintiff's claims are more properly analyzed under the medical mistreatment standards set forth in such Sixth Circuit decisions as *Williams*, *Comstock*, and *Terrance*. The claims against the remaining Defendants, in contrast, are better suited for consideration under the more general standard of "deliberate indifference."

Turning, then, to the federal Eighth Amendment claims against Defendants Rice and Hemachandra, Plaintiff's general theory of liability, of course, is that a different course of mental health treatment and a different housing arrangement at the Oakland County Jail would have prevented his suicide. As all agree, prisoners do not have a generalized right to be correctly screened for suicidal tendencies, or to be absolutely protected against committing suicide. *See House v. County of Macomb*, 303 F.Supp.2d 850, 854 (E.D.Mich.2004) (quoting *Davis v. Fentress County*, 6 Fed.Appx. 243, 248-49 (6th Cir.2001)). Yet, it is just as clear that a prisoner's "psychological needs may constitute serious medical needs, especially when they result in suicidal tendencies." *Horn*, 22 F.3d at 660; *see also Comstock*, 273 F.3d at 703; *Davis*, 6 Fed.Appx. at 248-49.

Under the objective prong of the "deliberate indifference" standard, Plaintiff must produce evidence of a "serious medical need" that Defendants Rice and Hemachandra were obliged to address. As noted, this can be shown through objective evidence of "grossly inadequate

care." *Terrance*, 286 F.3d at 843. In the more specific context of a prisoner suicide, the Sixth Circuit has stated that the relevant inquiry is whether the evidence establishes a "strong likelihood" that the prisoner would attempt to take his own life. *Barber v. City of Salem*, 953 F.2d 232, 239-40 (6th Cir.1992); *see also Davis*, 6 Fed.Appx. at 248-50; *House*, 303 F.Supp.2d at 854.

The Court finds that genuine issues of material fact remain as to this prong of the "deliberate indifference" inquiry. It is undisputed that Plaintiff was consistently diagnosed with a significant mental illness, that he was repeatedly treated for this condition over a long period of time, and *841 that psychiatric medication was prescribed for this disorder. Indeed, upon examining Plaintiff just two weeks before his suicide, Dr. Hemachandra diagnosed him as suffering from a schizoaffective disorder, among other conditions, and he recommended counseling and medication for this condition. Dr. Hemachandra's report of his November 8, 2002 psychiatric evaluation also disclosed Plaintiff's past history of suicide attempts and ADHD, and found that he continued to experience mood fluctuations and paranoia. Thus, it is apparent that Plaintiff suffered from a major mental disorder that required ongoing attention and treatment, as evidenced by Dr. Hemachandra's treatment recommendations and his scheduling of a follow-up appointment later in November.

Moreover, this record would permit, albeit not compel, the conclusion that Plaintiff posed some likelihood of another suicide attempt. To be sure, Dr. Hemachandra opined that Plaintiff gave no indication of suicidal ideation during his

final evaluation on November 8, 2002. Similarly, Rice's counseling notes during this time period of early to mid-November show that Plaintiff denied any suicidal ideation, and they reflect Rice's conclusion that Plaintiff was not suicidal or otherwise in need of an enhanced watch status. Yet, there is no question that Plaintiff had both threatened and attempted suicide in the past, and that he had been repeatedly placed on behavior and suicide watches during his periods of incarceration at the Oakland County Jail. Indeed, as recently as late October of 2002, Plaintiff apparently attempted suicide in his Oakland County Jail cell,[9] leading Rice to place him in an observation cell under an active suicide watch, and leading Dr. Hemachandra to recommend that he be kept under close observation.

Although Dr. Hemachandra opined at his deposition that someone who has previously considered or attempted suicide does not "necessarily" pose a present risk of suicide, he acknowledged that such threats and attempts are factors to be considered in making such an assessment. (*See* Oakland County Defendants' Motion, Ex. E, Hemachandra Dep. at 33.) Dr. Hemachandra further explained that he considers whether a patient is taking his prescribed psychiatric medication, and he acknowledged that a patient who fails to do so might become depressed, unstable, unable to control his moods, and suicidal. (*See id.* at 33, 46-47.) Indeed, in his last meeting with Plaintiff, Dr. Hemachandra emphasized the importance of taking his medication in order to remain stable

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9. Although Defendants seemingly dispute whether this was an actual suicide attempt, there is at least an issue of fact on this point, where the jail's own records reflect a "suicide attempt" on this occasion. (*See* Plaintiff's Response, Ex. 17.)

and keep his depression under control. (*See id.* at 29.) Along the same lines, Plaintiff has produced an expert opinion stating, among other things, that individuals who suffer from schizophrenia and have made past suicide attempts pose a much higher risk of suicide, and that Plaintiff fell within a higher-risk group of young, unmarried males. Viewing this record in a light most favorable to Plaintiff, the Court finds that questions of fact remain as to whether Plaintiff arguably evidenced a significant likelihood of attempting suicide or otherwise manifested a serious need for mental health care.

The subjective prong of the "deliberate indifference" inquiry presents a much closer question, however, and requires separate consideration of the claims and evidence against Defendants Rice and Hemachandra. Regarding Roberta Rice, an inmate caseworker, the Oakland County Defendants point to Rice's repeated assessment in her counseling notes that Plaintiff was not suicidal. Whether or not this assessment was correct, and regardless of whether Rice might have been negligent in failing to perceive the true risk posed by Plaintiff, Defendants argue that the record lacks any evidence that Rice subjectively perceived this risk and yet disregarded it, as required to establish deliberate indifference. More generally, Defendants contend that Rice's conduct should not be analyzed by reference to the Sixth Circuit's medical mistreatment decisions, such as *Terrance*, because Rice's "job responsibility [wa]s to determine watch status and housing, not to make medical decisions regarding an inmate." (Oakland County Defendants' Reply Br. at 4.)

Although the question is a close one, the Court cannot conclude that the record compels a determination in Rice's

favor as a matter of law. On one hand, as Defendants correctly point out, this is not a case in which prison officials completely ignored an inmate's serious medical needs. Rather, the record reflects that Rice consistently took action and repeatedly met with Plaintiff as problems arose during his several periods of incarceration. When a professional such as Rice provides services, "albeit carelessly or inefficaciously, to a prisoner, he has not displayed a deliberate indifference to the prisoner's needs, but merely a degree of incompetence which does not rise to the level of a constitutional violation." *Comstock*, 273 F.3d at 703. Thus, Plaintiff cannot sustain his claim against Rice merely by citing, for example, his expert's opinion that Rice acted incompetently in her handling of Plaintiff's mental health and housing needs.

Nonetheless, there is a disturbing lack of consistency in Defendants' argument on this point. They repeatedly emphasize that Rice did not make medical decisions or diagnoses, and yet speak of Rice having "determined" at various points that Plaintiff was not suicidal and that his condition was stable. (*See, e.g.*, Oakland County Defendants' Reply Br. at 3.) While Defendants state that Rice made these assessments as part of her responsibility to make housing assignments and determine watch status, the facts of this very case reveal that such decisions can sometimes affect an inmate's medical needs-here, the need to be monitored for a possible suicide attempt. This is precisely the basis for Plaintiff's and his expert's challenge to Rice's "competence"-namely, that she was making decisions that were essentially medical in nature, or that, at a minimum, could undermine Plaintiff's necessary treatment program, but without the necessary medical background or expertise.

Viewed in this light, the Court finds that issues of fact remain as to whether Rice was subjectively aware of, and yet disregarded, Plaintiff's serious medical needs. Through her several decisions to place Plaintiff on an elevated watch status, most recently less than a month before he committed suicide, and by her occasional determinations to house Plaintiff in an observation cell or with a roommate, Rice arguably demonstrated the subjective knowledge, at least at some points, that Plaintiff posed a risk of suicide.[10] Yet,

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10. In light of this evidence, the Court cannot agree with Defendants' contention that the decision in *House*, *supra*, is directly on point here. In that case, the defendant jail officials were aware that the plaintiff suffered from a mental illness, but the record did not disclose any past suicide attempts. In addition, while the plaintiff apparently told jail officials that she was suicidal, the uniform assessment of all of these officials during the three days between the plaintiff's arrest and her suicide attempt was that the plaintiff was ***not*** suicidal. *See House*, 303 F.Supp.2d at 851-52. Thus, in granting summary judgment to the defendants on the plaintiff's Eighth Amendment claims, the Court found "no evidence anyone actually knew that [the plaintiff] was suicidal or facing some other excessive health or safety risk," but that, to the contrary, "the police and medical records created during the relevant period indicate that the key individuals responsible for [the plaintiff's] care and evaluation affirmatively concluded that she was not suicidal." 303 F.Supp.2d at 854.

The record here is significantly different. In particular, Plaintiff had attempted suicide in the past, and there is ample evidence that, at various points during his periods of incarceration at the Oakland County Jail, he had been evaluated by Dr. Hemachandra and caseworker Rice as potentially suicidal and as requiring a special housing assignment and watch status. In addition, Defendants here

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viewing the record in a light most favorable to Plaintiff, Rice arguably disregarded this known risk by approving Plaintiff for single cell housing on November 18, 2002, without first referring Plaintiff for a medical assessment by Dr. Hemachandra to confirm that this housing assignment was appropriate, or otherwise ensuring that Plaintiff's mental condition had improved to a degree that would permit this reassignment. Under a view of the evidence most favorable to Plaintiff, a trier of fact could construe Rice's notes of her November 18, 2002 counseling session with Plaintiff as focusing inordinately on Plaintiff's difficulties in getting along with his fellow inmates in his current 10-man cell assignment, while paying insufficient heed to the mental health question of whether Plaintiff posed a risk of suicide if housed in a single cell.

Nor is Rice shielded from liability by virtue of her assessments throughout November of 2002 that Plaintiff did not appear suicidal. *See Comstock*, 273 F.3d at 709-11 (holding that the defendant psychologist's statement that had "exercised his medical judgment" in removing the plaintiff's decedent from suicide watch did not preclude a finding that he was aware of and yet disregarded a risk of serious harm, where there were issues of fact as to whether he performed a

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had substantial past experience with Plaintiff, and the record reflects evolving mental health needs and varying assessments of Plaintiff's current mental condition. In contrast to the defendants in *House*, who knew only generally that the plaintiff suffered from a mental disorder and that she claimed to be suicidal, Defendants in this case had a sizable store of information at their disposal that would have alerted them to the severity of Plaintiff's condition.

"reasoned assessment" in reaching his decision). Initially, the Court notes that it would be difficult to accord significant weight to this evidence, where Rice herself has acknowledged that she is not qualified to make medical assessments.

Presumably, though, Rice would be entitled to rely upon Dr. Hemachandra's judgment on this issue following his November 8, 2002 evaluation of Plaintiff, but only if the situation remained stable and relatively unchanged in the days after this medical assessment. In fact, however, Rice learned in the interim that Plaintiff had continued to refuse his medications, that he had not sought or obtained Dr. Hemachandra's approval of this course of action during their most recent session, and that he had experienced problems in a 10-man cell and had been stealing from his fellow inmates. In addition, Rice presumably was aware that Plaintiff had never received any of the counseling recommended by Dr. Hemachandra. Under these circumstances, a trier of fact could conclude that Rice disregarded a known risk of serious harm by making decisions about Plaintiff's housing and watch status without securing the considered views of a qualified mental health professional regarding the implications of these decisions to Plaintiff's health and well-being, and without properly considering the possible impact of the various changes in circumstances since Dr. Hemachandra's most recent mental health evaluation.[11]

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11. Although Rice apparently contacted Dr. Hemachandra on November 19, 2002 to discuss Plaintiff's situation, and particularly his refusal to take his prescribed psychiatric medications, the record does not disclose the content or outcome of this discussion, beyond Dr. Hemachandra's decision to discontinue Plaintiff's medications

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To be sure, the record does not compel this conclusion. For example, a trier of fact could accept at face value Rice's statements in her November 4 and November 18, 2002 reports that Plaintiff did not appear suicidal. Under this view of the record, whether or not Rice should have perceived a risk of harm, and whether or not she should have trusted her own competence to make, in effect, a medical judgment about the state of Plaintiff's mental health despite the changed conditions since Dr. Hemachandra's most recent evaluation, the brute fact would remain that Rice did not subjectively perceive the danger posed by Plaintiff's condition. Yet, the Court simply is unable to hold that this is the only permissible view of the record, particularly in light of Rice's acknowledged awareness that Dr. Hemachandra had diagnosed Plaintiff as suffering from a significant mental health disorder that required medication, but that Plaintiff recently had refused to take this medication and claimed that he did not need it.

The analysis of the claims against Dr. Hemachandra is more straightforward, albeit still by no means clear cut. As with Defendant Rice, it bears emphasis that Dr. Hemachandra did not altogether disregard Plaintiff's mental health needs, but instead examined him and made treatment

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and to advance his next scheduled appointment from November 29 to November 26. Elsewhere in her deposition, however, Rice made it clear that it was her responsibility to determine an inmate's housing assignment and watch status, and that Dr. Hemachandra could not overrule this decision-or, at least, that he had never before done so. (*See* Oakland County Defendants' Motion, Ex. G, Rice Dep. at 70-73.)

recommendations on a regular basis, pursuant to the referrals of Rice and other jail officials. Once again, then, Plaintiff cannot sustain his Eighth Amendment claims merely by asserting that Dr. Hemachandra provided negligent or ineffective treatment, or by offering an expert opinion that questions Dr. Hemachandra's medical judgment. *See Comstock*, 273 F.3d at 703; *Williams*, 186 F.3d at 691. In particular, it does not matter whether Plaintiff or his expert might disagree with Dr. Hemachandra's determination, following his last evaluation of Plaintiff on November 8, 2002, that Plaintiff did not manifest any suicidal ideation and did not appear to be suicidal. Nor, in contrast to the claims against Defendant Rice, can it be said that such assessments were beyond Dr. Hemachandra's area of expertise. Finally, the subjective prong of the "deliberate indifference" standard cannot be satisfied as to Dr. Hemachandra merely by showing that prison officials failed to carry out his recommended plan for treating Plaintiff's mental illness.

Rather, the only possible indication of a serious health risk that Dr. Hemachandra subjectively perceived and yet failed to act upon concerns Plaintiff's continued refusal to take his psychiatric medications as prescribed by the doctor. Dr. Hemachandra himself recognized the importance of Plaintiff taking his medication, and he emphasized this point to Plaintiff during the November 8 evaluation. Yet, a few days later, on November 19, Dr. Hemachandra learned from Rice that Plaintiff was continuing to refuse his medications. In response, the doctor discontinued the medications and advanced Plaintiff's next scheduled appointment by three days, from November 29 to November 26. He did not, however, offer any opinion as to whether Rice had properly

approved Plaintiff for a single cell assignment without any special watch status.[12]

The question, then, is whether this absence of affirmative steps by Dr. Hemachandra, in light of the information that his patient was continuing to refuse his recommended psychiatric medications, could be found by a trier of fact to constitute disregard of a known and serious medical need. While the question certainly is a close one, the Court answers it in the negative. First, it bears emphasis that Dr. Hemachandra already knew at the time of his last evaluation of Plaintiff on November 8 that Plaintiff was not taking his medication. (*See* Oakland County Defendants' Motion, Ex. E, Hemachandra Dep. at 27.) Despite this, the doctor determined through his own direct evaluation that Plaintiff "was not suicidal," finding "no evidence of helplessness, hopelessness, death wishes, suicidal thoughts or plans," but that, to the contrary, Plaintiff appeared "upbeat" and looking to the future. (*Id.* at 27-28.) Thus, when Dr. Hemachandra later learned that Plaintiff was continuing to refuse his medications, this alone would not cast doubt upon the doctor's most recent assessment, or establish the doctor's subjective awareness of and disregard for a heightened risk that Plaintiff might harm himself. Moreover, there is no evidence that Dr. Hemachandra learned anything during his November 19 discussion with Rice that would have suggested a heightened risk. For all that appears in the record, he was told only that Plaintiff remained unwilling to take his medications. In any event, even if Rice had reported her own

12. As noted, there is no evidence that Rice actually sought Dr. Hemachandra's opinion on this subject.

observations to the doctor, he would have learned only that, in Rice's view, Plaintiff was doing well despite refusing his medication.

More importantly, Dr. Hemachandra played no role, nor was his opinion sought, in the fateful decision to approve Plaintiff for single cell housing with no special watch status. Indeed, as to this aspect of the heightened risk of harm posed to Plaintiff, there is no evidence that the doctor even knew that this housing reassignment had occurred. Rather, Rice testified that she did not consult with Dr. Hemachandra prior to clearing Plaintiff for single cell housing on November 18, and that, in her conversation with the doctor the following day, she merely informed him that Plaintiff (i) had denied needing mental health treatment, (ii) was still refusing to take his medication, (iii) had promised to raise these matters during the doctor's November 8 evaluation but had not done so, and (iv) was learning disabled. (*See* Oakland County Defendants' Motion, Ex. G, Rice Dep. at 65-66.) Again, none of this would have suggested that Plaintiff faced an increased risk of harm since Dr. Hemachandra's most recent assessment.

Under this record, the only serious medical need that Dr. Hemachandra could possibly have perceived was the need for periodic assessments to ensure that Plaintiff's mental health was not deteriorating as a result of a prolonged lack of medication. The doctor did not disregard this risk-to the contrary, he advanced Plaintiff's next scheduled appointment by three days upon learning on November 19 that Plaintiff still was refusing his medication. The Court does not view the "deliberate indifference" standard as imposing an

affirmative duty upon Dr. Hemachandra to ensure that other prison officials consult with him before making housing or watch status decisions about patients he is treating for mental health conditions. Nor can Dr. Hemachandra*846 be said to have disregarded a known risk by failing to insist that he be given the opportunity to re-evaluate Plaintiff's mental health status before any changes were made to this inmate's cell assignment or watch status.[13] At most, the evidence would permit the conclusion that Dr. Hemachandra erred in his professional judgment as to how Plaintiff would function without his medication, and failed to appreciate the heightened risk that might result from this refusal. Such after-the-fact questions about the correctness of medical judgments cannot satisfy the "deliberate indifference" standard. *See Comstock*, 273 F.3d at 703.[14]

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13. Plaintiff's expert suggests that Dr. Hemachandra owed an ethical duty to his patients to ensure that he alone, and not unqualified prison employees, made all of the medical judgments relevant to the treatment of their mental health conditions. To the extent that this could be viewed as malpractice, however, this would not suffice to establish deliberate indifference to Plaintiff's serious medical needs. *See Comstock*, 273 F.3d at 703. Moreover, there is no evidence that Dr. Hemachandra possessed any policymaking authority that would have permitted him to override the procedures in place at the Oakland County Jail for determining cell assignments and watch status.

14. The Court recognizes that it might seem incongruous to hold that only Roberta Rice, and not Dr. Hemachandra, faces potential § 1983 liability in this case, despite the doctor's presumably superior medical expertise in evaluating the suicide risk posed by Plaintiff, and despite the significant overlap in the facts underlying the claims against these two Defendants. Yet, the two sets of facts

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This leaves only the question whether, despite the evidence in support of an Eighth Amendment claim against her, Defendant Rice nonetheless is shielded from liability by the defense of qualified immunity. Under this doctrine, Rice cannot be held liable for violating an Eighth Amendment right unless this right was "clearly established" at the time of her actions, such that "a reasonable official [in her position] would have understood that [her] conduct violated the right." *Comstock*, 273 F.3d at 711. "As the Supreme Court has instructed, [this Court] need not find a case in which the very action in question has previously been held unlawful, but, in light of the pre-existing law[,] the unlawfulness must be apparent." *Comstock*, 273 F.3d at 711 (internal quotation marks and citation omitted).

Given the closeness of the question whether the record, viewed in a light most favorable to Plaintiff, could establish an Eighth Amendment violation by Defendant Rice, the Court is compelled to conclude that Rice is entitled to qualified

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are sufficiently different, and in crucial respects, to warrant the conclusion that Rice and Dr. Hemachandra are not similarly situated for purposes of the Court's Eighth Amendment analysis. Most significantly, Dr. Hemachandra was not fully apprised of all of the changes in Plaintiff's circumstances since his last evaluation, nor was the doctor asked to opine whether single cell housing was appropriate in light of these circumstances and Plaintiff's underlying condition. Moreover, to the extent that Dr. Hemachandra and Rice alike were equally mistaken in their assessments of Plaintiff's medical needs, the doctor's competence to make such a judgment, even if mistaken, permits him to better withstand an Eighth Amendment challenge to his professional opinions.

immunity. In arguing to the contrary, Plaintiff asserts that the right at issue here is the right to psychiatric care that meets an inmate's serious mental health needs. If so, the Court certainly would agree that this right was "clearly established" at the time of the conduct at issue here. *See, e.g., Comstock*, 273 F.3d at 711; *Horn*, 22 F.3d at 660. Yet, the Supreme Court has cautioned against conducting this prong of the qualified immunity inquiry at too high a "level of generality," and has emphasized that "the right the official is alleged to have violated must have been 'clearly established in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *see also Williams*, 186 F.3d at 691 n. 2 (criticizing as "too general" the formulation of the right at issue in that case as an inmate's right "to receive necessary psychiatric care").

As discussed earlier, if the Eighth Amendment claim against Rice rested solely upon her own assessments of Plaintiff's condition and her housing decisions based on these assessments, any error in these judgments would not sustain a claim of deliberate indifference. Rather, any constitutional violation that occurred was the result of Rice's election to forge ahead with these judgments, despite her acknowledged lack of medical expertise, without first seeking the views of a qualified medical professional regarding the appropriateness of single cell housing in light of Plaintiff's mental health condition and the changes in circumstances since Plaintiff was last evaluated by Dr. Hemachandra. Neither Plaintiff nor the Court's own research has identified

a Supreme Court or Court of Appeals decision involving comparable facts, nor has Plaintiff otherwise shown that the unlawfulness of Rice's course of action should have been apparent in light of the existing case law.

Indeed, as discussed below, if Rice's conduct here were deemed clearly violative of existing law, one would expect to find different policies and practices in place at the Oakland County Jail and at similar facilities across the country. As acknowledged by one of Plaintiff's experts, the vast majority of county jails allow determinations about an inmate's suicidal tendencies to be made by employees who are not psychiatrists, but instead have merely been trained in suicide detection and prevention. Similarly, in this case, there is no evidence that Rice deviated from her usual practice in determining Plaintiff's cell assignments-rather, it is clear from her testimony that she routinely makes such decisions based on her own assessments, and without first consulting the inmate's treating physician or psychiatrist. Although Plaintiff's experts question whether a caseworker such as Rice, with suicide detection and prevention training but no advanced degree in psychiatry, should be allowed to make such determinations, Plaintiff has failed to demonstrate that it was clearly unlawful for her to do so at the time she made the cell assignment at issue here.

To be sure, if Oakland County's policies and practices on this subject did not pass constitutional muster, Rice's strict adherence to these practices would not preclude a finding that she violated Plaintiff's rights under the Eighth Amendment. For purposes of the Court's qualified immunity analysis, however, Rice should not be compelled to question

the legality of her employer's policies, absent clearly established law that would have alerted her to such a defect. Because the Court has been unable to locate any such pre-existing law, Rice is entitled to qualified immunity.

3. Plaintiff's Eighth Amendment Claims Against the Oakland County Sheriff and Deputies

Plaintiff's Eighth Amendment claims against the remaining individual Defendants-Oakland County Sheriff Michael J. Bouchard and deputies Michael Monroe, Terry Montgomery, and John Jorganson-are much more easily resolved. Defendants argue that the claim against Sheriff Bouchard rests solely upon an impermissible theory of *respondeat superior*, and that the claims against the deputies fail for lack of evidence that they disregarded any known risk faced by Plaintiff. The Court agrees.

Regarding Sheriff Bouchard, the complaint alleges only that he was the commanding officer of the Oakland County Sheriff's Department and the Defendant deputies, that he was responsible for ensuring that the County's deputies enforced and followed the law, and that he was in charge of the Oakland County Jail. As noted by Defendants, however, these supervisory allegations alone cannot sustain a § 1983 claim, absent allegations and evidence that Sheriff Bouchard himself engaged in "active unconstitutional behavior" by directly participating, encouraging, authorizing, or acquiescing in the allegedly offending conduct of a sheriff's deputy. *See Doe v. City of Roseville*, 296 F.3d 431, 439-40 (6th Cir.2002); *Comstock*, 273 F.3d at 712-13. In his response to the Oakland County Defendants' motion, Plaintiff does not even attempt

to identify any evidence of such affirmative conduct by Sheriff Bouchard, but instead mentions him only along with the Defendant Oakland County as having adopted allegedly unconstitutional customs or practices for providing care to mentally ill inmates. This "official capacity" claim against the Sheriff, which is essentially a claim against the County itself, *see Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1245 (6th Cir.1989), does not provide a basis for individual liability against the Sheriff under § 1983.

Regarding Deputy John Jorganson, the record indicates that he placed Plaintiff in a single cell on November 18, 2002, following Plaintiff's difficulties with his fellow inmates in his existing 10-man cell assignment. This single cell, of course, was the one in which Plaintiff committed suicide four days later. In light of his history of prior suicide and behavior watches, Plaintiff argues that "a jury could possibly decide that a reasonable person, in Deputy Jorganson's position, would have concluded that a substantial risk of serious harm to [Plaintiff] existed" by placing him in a single cell. (Plaintiff's Response Br. at 22.) Be that as it may, however, the "deliberate indifference" standard requires evidence that Deputy Jorganson ***actually perceived*** this risk. *See Farmer*, 511 U.S. at 837-38, 114 S.Ct. at 1979; *Comstock*, 273 F.3d at 703.

The evidentiary record not only fails to support this conclusion, but it essentially refutes it. In accordance with jail policy, which requires that any inmate who previously has been on watch status must be cleared for single cell housing, Deputy Jorganson sought the approval of inmate caseworker Roberta Rice before transferring Plaintiff from

a 10-man to a single cell. Before placing Plaintiff in a single cell, Deputy Jorganson obtained clearance from Rice to make this transfer-specifically, as disclosed in her November 18, 2002 counseling notes, Rice concluded that Plaintiff could safely be placed in a single cell, and that no watch was necessary. In reliance on this determination, by the jail official expressly authorized to make housing and watch status decisions, Deputy Jorganson placed Plaintiff in a single cell. Plainly, then, Deputy Jorganson had no basis to believe that a single cell assignment posed a significant risk of harm to Plaintiff, where he had been assured by a presumably competent authority that there was no such risk.[15] And, there is no evidence whatsoever that, despite this assurance, Deputy Jorganson nonetheless perceived that a single cell assignment could jeopardize Plaintiff's health and well-being. Accordingly, Plaintiff cannot satisfy the subjective prong of his Eighth Amendment "deliberate indifference" claim against Deputy Jorganson.

The claims against Deputies Monroe and Montgomery fail for similar reasons. Plaintiff's sole basis for seeking to impose liability on these Defendants is that they were on duty on Plaintiff's cell block when he committed suicide on November 22, 2002. Contrary to a jail policy calling for "clock rounds" to be conducted every 60 minutes, the Defendant deputies conducted clock rounds at 5:47 p.m. and 7:03 p.m., a 76-minute interval during which Plaintiff hung himself from a bed sheet in his cell. From these facts, Plaintiff

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15. Indeed, even if Deputy Jorganson had reviewed Plaintiff's medical records, the most recent psychiatric assessment of Plaintiff by Dr. Hemachandra would have confirmed Rice's determination that Plaintiff was not suicidal.

maintains that "a jury could possibly decide that a reasonable person, in [the deputies'] position, would have concluded that a substantial risk of serious harm to [Plaintiff] existed." (Plaintiff's Response Br. at 22-23.) Once again, however, this objective standard, even if satisfied, does not address the subjective prong of the "deliberative indifference" inquiry-it is not enough, in other words, for Plaintiff "to demonstrate a question of fact whether the . . . sheriff's deputies *should have* known" of a substantial risk faced by Plaintiff. *Watkins v. City of Battle Creek*, 273 F.3d 682, 686 (6th Cir.2001).

In fact, the record is utterly silent as to this issue of what Deputies Monroe and Montgomery subjectively perceived. Given that Plaintiff had been placed in a single cell and no special watch status had been ordered, there would have been no particular reason for these deputies to believe that it was necessary to watch Plaintiff any more closely than any other inmate. This being the case, there would have been no basis for these deputies to perceive that Plaintiff (or any other inmate on the cell block) faced a substantial risk of serious harm if they conducted their rounds 16 minutes further apart than mandated under jail policy. And, once again, there is no evidence that Deputy Monroe or Deputy Montgomery actually drew the inference that their delayed rounds might threaten Plaintiff's health and well-being.

Indeed, if Plaintiff's theory of liability were accepted as to Deputies Jorganson, Monroe, and Montgomery, a jailer would always be chargeable with knowledge of a substantial risk of harm to an inmate, so long as the inmate had been placed on a special watch status at any point during his

incarceration. Neither Plaintiff nor the Court's own research has uncovered any authority for this position. Plainly, an inmate's watch status can change from time to time, and prison guards presumptively are entitled to rely on the determination of a designated authority that such a change is based on sound medical or other professional judgment. Nothing in the record in this case would demand that the Defendant deputies second-guess Rice's decision that Plaintiff did not need a special cell assignment or watch status.

C. Plaintiff's § 1983 Claim Against Defendant Oakland County

The sole remaining federal claim asserted by Plaintiff is a § 1983 claim against Defendant Oakland County. Under familiar principles, this governmental Defendant "cannot be held liable under § 1983 for an injury inflicted solely by its employees or agents." *Gregory v. Shelby County*, 220 F.3d 433, 441 (6th Cir.2000) (citing *Monell v. Department of Social Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978)). Instead, "[f]or liability to attach, there must be execution of a government's policy or custom which results in a constitutional tort." *Gregory*, 220 F.3d at 441. Moreover, Plaintiff must establish that "through its deliberate conduct, the [County] was the 'moving force' behind" the violation of his constitutional rights-that is, he "must show that the [County's] action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the [County's] action and the deprivation of federal rights." *Gregory*, 220 F.3d at 442 (quoting *Board of County*

Comm'rs of Bryan County v. Brown, 520 U.S. 397, 405, 117 S.Ct. 1382, 1389, 137 L.Ed.2d 626 (1997)).

Juxtaposing these and the relevant Eighth Amendment standards set forth earlier, Plaintiff must identify a Oakland County policy or custom that evidenced the County's deliberate indifference to the serious mental health needs of inmates confined at the County Jail. The initial portion of this inquiry, at least, follows from the Court's analysis to this point. First, it is clear that the County's liability must rest, if at all, upon the actions of Defendant Rice, because the Court already has concluded that only this Defendant could be found by a trier of fact to have violated Plaintiff's Eighth Amendment rights. *See Watkins v. City of Battle Creek*, 273 F.3d 682, 687 (6th Cir.2001); *Scott v. Clay County*, 205 F.3d 867, 879 (6th Cir.2000).

Next, it is evident from the Court's earlier discussion that the evidence forges the requisite causal link between Rice's actions and an Oakland County policy or practice. Plaintiff's theory on this point is that a County custom or practice caused his constitutional injury by allowing Rice, an individual without the appropriate mental health education and expertise, to make decisions that affected the care and treatment of a mentally ill inmate. Although the Oakland County Defendants characterize Rice's decisions regarding cell placement and watch status as administrative rather than medical in nature, Plaintiff and his expert, Dr. Emanuel Tanay, assert that a decision to place an inmate in a single cell can have implications to his mental health treatment, by creating an environment in which a mentally ill inmate can cause harm to himself. In addition, the Court already has noted the

Appendix B

Oakland County Defendants' express acknowledgment that Rice made determinations as to Plaintiff's mental stability and suicidal tendencies that, viewing the record in a light most favorable to Plaintiff, could be deemed to lie within the province of a mental health professional.

Thus, while the Oakland County Defendants-and, apparently, the County's formal policies-attempt to draw a clear distinction between the administrative, non-medical determinations made by caseworkers such as Rice, and the medical assessments made by trained psychiatrists such as Dr. Hemachandra, Plaintiff has raised a substantial question whether the actual customs and practices employed by Rice and other caseworkers tend to blur this claimed distinction. As an example, Plaintiff cites the deposition testimony of Oakland County Jail administrator Ann Russell, who is responsible for drafting the jail's policies and procedures, and who characterized the role of an inmate caseworker as implementing the treatment plan developed by an inmate's psychiatrist. In this case, this presumably would mean that Rice was responsible for carrying out the treatment recommendations made by Dr. Hemachandra regarding psychiatric medications and counseling. Yet, despite the fact that Plaintiff had refused his medications and was not provided with counseling, Rice alone made the determination, without first consulting with Dr. Hemachandra, that Plaintiff was not suicidal and could be safely housed in a single cell.

Rice acknowledged at her deposition that her decisions on such matters of housing are final, at least as a practical matter, and that Dr. Hemachandra, for one, could not overrule

her decisions. (*See* Plaintiff's Response, Ex. 24, Rice Dep. at 71.) In addition, Rice consistently maintained throughout her deposition that her role in the decisions regarding Plaintiff's incarceration was wholly in keeping with the functions typically performed by the County's inmate caseworkers, and the Oakland County Defendants nowhere contend that Rice deviated from her proper role. This record, in the Court's view, raises genuine issues of fact as to whether, as a matter of Oakland County custom or practice, a jail official without sufficient medical background or expertise was authorized to make decisions affecting the health care needs of Plaintiff, an inmate with a significant mental health disorder.

There remains only the question whether the County acted "with the requisite degree of culpability," *Gregory*, 220 F.3d at 442, in establishing, or at least allowing, the challenged custom or practice. On this point, the "deliberate indifference" standard applies to the County and the individual Defendants alike. *See Gray v. City of Detroit*, 399 F.3d 612, 617-18 (6th Cir.2005); *Barber v. City of Salem*, 953 F.2d 232, 238-40 (6th Cir.1992); *Crocker v. County of Macomb*, 285 F.Supp.2d 971, 977 (E.D.Mich.2003), *aff'd*, 119 Fed.Appx. 718 (6th Cir.2005). Under this standard, the County has "a duty . . . to recognize, or at least not to ignore, obvious risks of suicide that are foreseeable," and to "take reasonable steps" to prevent an inmate's suicide "[w]here such a risk is clear." *Gray*, 399 F.3d at 618.

Nonetheless, "[d]eliberate indifference remains distinct from mere negligence," *Gray*, 399 F.3d at 618 n. 1, and the County is not liable under § 1983 if it negligently administers

reasonable policies or if, in hindsight, a different practice might have decreased the risk of Plaintiff's suicide, *Gray*, 399 F.3d at 618 n. 1; *Crocker*, 285 F.Supp.2d at 977. Rather, " 'deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Brown*, 520 U.S. at 410, 117 S.Ct. at 1391. Moreover, it is important to bear in mind that, in formulating policies and practices, local governments are constrained by such practical considerations as "the allocation of resources," including "time, personnel, and money." *Roberts v. City of Troy*, 773 F.2d 720, 725 (6th Cir.1985).

The record here, viewed in a light most favorable to Plaintiff, simply does not establish that the County acted with deliberate indifference in allowing inmate caseworkers such as Defendant Rice to make housing decisions that, on occasion at least, implicated the medical needs of County Jail inmates. Initially, the Court notes the absence of any evidence linking this practice to a suicide or suicide attempt by any other County Jail inmate. This strongly suggests a lack of foreseeability that the County's practice posed a significant risk of inmate suicides. *See Gray*, 399 F.3d at 619 (finding no deliberate indifference because, among other reasons, the plaintiff's decedent was the only individual who had committed suicide in a particular City of Detroit facility in the past 20 years); *Howard v. Calhoun County*, 148 F.Supp.2d 883, 891 (W.D.Mich.2001).

In addition, the Court already has noted the testimony of Plaintiff's expert that the challenged practice here is widespread, with the vast majority of county jails allowing

employees who are not psychiatrists, but who have been trained in suicide detection and prevention, to make determinations whether inmates are suicidal or potentially suicidal. This surely would provide an adequate database from which Plaintiff and his experts could cull and demonstrate an obvious risk of harm posed by this widespread practice. Yet, the record is utterly silent as to whether any other inmate's suicide could be linked to the use of such a practice at any of these facilities.

Instead, Plaintiff has offered only expert opinions that the County's practice is inadequate, poses a danger to inmates with severe mental illnesses, and should be changed to better integrate psychiatric professionals into inmate housing decisions. At best, however, this would permit the conclusion that the County acted negligently by adopting or permitting a practice that proved inadequate in this case. The case law uniformly holds that such evidence does not satisfy the "deliberate indifference" standard. *See Gray*, 399 F.3d at 618-19; *Molton v. City of Cleveland*, 839 F.2d 240, 246 (6th Cir.1988); *Roberts*, 773 F.2d at 725; *Crocker*, 285 F.Supp.2d at 977. Consequently, Oakland County is entitled to summary judgment in its favor on Plaintiff's federal § 1983 claim.[16]

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16. Defendants also address Plaintiff's state-law claims in their motions. The Court declines, however, to exercise supplemental jurisdiction over these remaining state-law claims, in light of the resolution of all claims over which the Court has original jurisdiction. *See* 28 U.S.C. § 1367(c)(3).

Appendix B

IV. *CONCLUSION*

For the reasons set forth above,

NOW, THEREFORE, IT IS HEREBY ORDERED that the Oakland County Defendants' April 2, 2004 Motion for Summary Judgment is GRANTED as to the federal claims asserted by Plaintiff, and is otherwise DENIED WITHOUT PREJUDICE. IT IS FURTHER ORDERED that Defendant Dr. Sarath Hemachandra's March 31, 2004 Motion for Summary Judgment also is GRANTED as to the federal claims asserted against him by Plaintiff, and is otherwise DENIED WITHOUT PREJUDICE.

s/ Gerald E. Rosen
Gerald E. Rosen
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 14, 2007

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 05-1583

ARIEL PEREZ, SR., PERSONAL REPRESENTATIVE OF THE ESTATE OF ARIEL E. PEREZ, JR.,

Plaintiff-Appellant,

v.

OAKLAND COUNTY, ET AL.,

Defendants-Appellees.

BEFORE: MOORE, GRIFFIN, and CUDAHY,* Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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* Hon. Richard D. Cudahy, Senior United States Circuit Judge forthe Seventh Circuit Court of Appeals, sitting by designation.

Appendix C

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
s/ Leonard Green
Leonard Green, Clerk